ARE NLRB AND COURT RULINGS MISCLASSIFYING SKILLED AND PROFESSIONAL EMPLOYEES AS SUPERVISORS?

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

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C O N T E N T S

ARE NLRB AND COURT RULINGS MISCLASSIFYING SKILLED AND PROFESSIONAL EMPLOYEES AS SUPERVISORS?

Tuesday, May 8, 2007
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 2:30 p.m., in Room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] Presiding.

Present: Representatives Andrews, Kildee, McCarthy, Wu, Holt, Sanchez, Sestak, Loebsack, Clarke, Courtney, and Kline.

Staff Present: Aaron Albright, Press Secretary; Alli Tylease, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Carlos Fenwick, Policy Advisor for Subcommittee on Health, Employment, Labor and Pensions; Michael Gaffin, Staff Assistant, Labor; Jeffrey, Hancuff, Staff Assistant, Labor; Brian Kennedy, General Counsel; Danielle Lee, Press/Outreach Assistant; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Policy Advisor; Michele Varnhagen; Labor Policy Director; Robert Borden, Minority General Counsel; Steve Forde, Minority Communications Director; Rob Gregg, Minority Legislative Assistant; Victor Klatt, Minority Staff Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; Loren Sweatt, Minority Professional Staff Member; and Richard Hoar, Minority Professional Staff Member.

Chairman ANDREWS. The subcommittee will come to order. I would ask if people could please take their seats. Good afternoon. We are very pleased to welcome our panel of witnesses here today to examine a very important, salient question of labor law. We are also pleased that the citizens and others who are here to join us today are here.

I especially want to make mention to many members of the nursing profession who are with us this afternoon. I know this is National Nurses Week. We think every week should be nurses week. I think that is true on both sides of the aisle. We both have great respect for the work done by the men and women of the nursing profession.

The topic of today's hearing is what I would call a Bermuda triangle for workers rights in our country. It has long been estab-

lished under the National Labor Relations Act and its cousin statutes that there is a group of people who are entitled to the protections of the National Labor Relations Act that can be in a bargaining unit, that can be represented at the bargaining table, that can have the rights won in the contract; and then there is another group of people who are part of the management, who are supervisors, for whose divided loyalties would never make it possible to be in both a union and representing the employer.

And for a very long time, although the definitions of those terms were not without controversy and ambiguity, for a very long time there was an understanding as to who was where in those definitions.

In response to a decision of the United States Supreme Court, commonly known as Kentucky River, last September the National Labor Relations Board issued a trilogy of decisions which have come to be known as the Kentucky River decisions, which I believe make a substantial change in settled law in the country—and an unwise and unwelcome one, in my view.

I believe that these decisions, when practiced in the workplace and the marketplace to their fullest extent, something that, frankly, could not have happened at this very early time, since the decisions are only from September on, I believe that these decisions, unfortunately, create a third category of American worker who has the worst of all worlds. That he or she has all the burdens of being a rank-and-file employee, has essentially no say in who gets hired or fired, no say in how compensation is structured, no say in how the organization is run. So he or she has all of those burdens but, frankly, none of the benefits of being in the managerial category.

By the same token, the person does not have the rights of being regarded as a rank-and-file worker, doesn't have the right to be in the bargaining unit, doesn't have the right to bargain collectively, doesn't have the right to avail him or herself of a grievance process that a contract may create.

So we have created this Bermuda triangle, in my view, where workers rights disappear, never to be heard from again.

Working with Senator Dodd in the less significant body of the Capitol, a number of us have come up with a legislative proposal to remedy that situation which we believe would provide clarity to employers, fairness to employees, and predictability to the economy.

Clearly this will not be an uncontroversial proposition. We have assembled a group of witnesses today that will have some disagreements among the four of them. But I believe strongly that the decisions that were rendered in September of 2006 are misguided, and I believe it is both the opportunity and the obligation of the Congress to remedy those decisions so that we can restore fairness and predictability in this area.

Pursuant to the rules of the committee, all members of the committee have the right to submit opening statements, without objection. But I will now turn to my friend, the Ranking Member of the subcommittee, Mr. Kline, for his opening statement.

[The prepared statement of Mr. Andrews follows:]

Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions

A major contributor to this middle class squeeze is the decline in workers' freedom to organize and collectively bargain. Organized workers earn more, have greater access to healthcare benefits, and are more likely to have guaranteed pensions than unorganized workers. When workers get their fair share, the economy benefits and the middle class grows stronger.

Yet the freedom to organize and collectively bargain has been under severe assault in recent decades, thanks to weak federal labor laws in dire need of reform. It has also been rolled back by a number of misguided decisions by the National Labor Relations Board (NLRB) in the last few years.

Last year, the NLRB issued a trio of decisions, collectively often referred to as the "Kentucky River" decisions, which eviscerated the meanings of "employee" and "supervisor" under the National Labor Relations Act (NLRA). The NLRA protects employees' freedom to organize and collectively bargain. Supervisors are not considered employees and are therefore not covered by the Act's protections. If an individual is determined to be a supervisor, she has no right to organize, no right to engage in concerted activity with her fellow employees, and no right to collectively bargain. Every fundamental right protected by the Act may turn on this question of whether she is a supervisor or an employee. The Kentucky River decisions dramatically expanded the definition of supervisor far beyond the limits that the authors of the act intended and far beyond the limits of common sense. In so doing, it stripped an estimated 8 million workers—particularly skilled and professional employees—of the freedom to organize.

To address this problem, I have introduced "Re-empowerment of Skilled and Professional Employees and Construction and Tradesworkers (RESPECT) Act" this Congress. The RESPECT Act serves to restore that freedom by addressing a series of decisions which stray dramatically from and undermine the original intent of the National Labor Relations Board and which fly in the face of common sense. This bill provides clarity in the NLRA on one aspect of the fundamental question of coverage: who is an employee and who is a supervisor.

Today, you will hear the opponents of the RESPECT Act argue that it unnecessary legislation because it is a solution in search of a problem. To the contrary, you will hear a first hand account of how one employer used the NLRB decisions to their advantage and to the demise of their employees by stripping them of their right to collectively bargain and organize. The RESPECT Act is necessary and its passage this year is essential to protecting millions of workers rights and protections.

Mr. KLINE. Thank you, Mr. Chairman, and thank you to the witnesses for being with us here today. In thinking about nurses week—of course in my house since my wife is a nurse, she says she is a retired nurse, we debate that sometimes, spent her whole life in nursing and my sister-in-law is a nurse and my niece is a nurse—every day is nurses day in our house.

The subcommittee meets this afternoon to examine the question, quote, "Are National Labor Relations Board and court rulings misclassifying skilled and professional employees as supervisors?" that is the question.

I would say at the outset that I don't think we can answer that question today in any meaningful fashion, largely because, as we will hear, a new standard of law has only just been announced by the National Labor Relations Board. Indeed the vast majority of the cases raising this question are currently being examined by the courts and the Board to determine on an individual, factual, and case-by-case basis whether and how this new standard applies to the status of a range of employees.

I am speaking, of course, of the Board's decision in Oakwood Healthcare announced last fall which revised the standard under the National Labor Relations Act for determining which employees are, in fact, supervisors. The Oakwood Healthcare decision, which was prompted by the Supreme Court's rejection of a prior standard

for determining supervisors in the cases of NLRB versus Kentucky River Community Care, Inc., the case to which the Chairman referred, clarified and refined the supervisor analysis to conform with the plain text of the National Labor Relations Act.

Under the Board's test in section 211 of the act, to be considered a supervisor, an employee must exercise one of a specified ranges of duties. He or she must do so exercising independent judgment; these activities must be exercised in the interest of the employer; and, of particular note, the supervisory duties must be those to which the employee devotes a regular and substantial portion of his or her time.

We are not talking about isolated instances where an employee occasionally directs the work of a coworker. We need to be clear about that.

Organized labor has been highly critical of the Board's Oakwood decision and labor allied think tanks have made a range of claims, which as we will hear today I am sure range from exaggerated to simply insupportable, in fact. This is unfortunate but perhaps not entirely surprising.

Long before the Board even issued its decision, organized labor had begun a campaign to discredit the upcoming ruling, complete with trumped-up, I believe, allegations that millions of workers would be transformed into supervisors overnight. Not surprisingly, we will again hear today, this Doomsday prediction has not come to pass.

We will also hear from witnesses today regarding legislation introduced by our subcommittee Chairman, Mr. Andrews. That bill, H.R. 1644, the Reempowerment of Skilled and Professional Employees and Construction Tradesworkers, RESPECT Act—you spent a lot of time on that didn't you, Mr. Chairman—departs from 60 years of legislation under the National Labor Relations Act and would, in my view, dramatically change the definition of a supervisor under the National Labor Relations Act. It would remove from the list of supervisory duties such criteria as assigning and responsibly directing other personnel, which to me in many instances may represent the very definition of supervisor.

I should interject that in my wife's several years—she never lets me say how many years of nursing—one of her assignments was as the head nurse of the ICU in Walter Reed, and so supervisory duties as a nurse is something that she is very familiar with.

Equally important, it would provide that any supervisory employee who spends more than half of his or her time doing his or her own work, rather than supervising others, would not be considered a supervisor. That is not the test used under a host of other statutes and represents a significant departure from 60 years of well-settled law.

Finally, I think it is important to note for the record the far-reaching application of Mr. Andrews' bill. While we will hear a lot of testimony about the classification of supervisors in the health care industry, the charge nurse issue, I think we must establish at the outset that neither the Board's Oakwood Healthcare decision nor Mr. Andrews' legislation is limited to that context. Instead, as we will hear from some of our witnesses, H.R. 1644 would change the law and potentially reclassify supervisory employees in a range

of industries, from health care to manufacturing to maritime shipping and beyond.

With that, Mr. Chairman, I look forward to hearing the views of each of our witnesses and yield back.

[The prepared statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Ranking Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good afternoon, and welcome to our witnesses.

The Subcommittee meets this afternoon to examine the question "Are National Labor Relations Board and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?" I would say at the outset that I don't think we can answer that question today in any meaningful fashion, largely because, as we will hear, a new standard of law has only just been announced by the National Labor Relations Board. Indeed, the vast majority of cases raising this question are currently being examined by courts and the Board to determine, on an individual, factual, and case-by-case basis, whether and how this new standard applies to the status of a range of employees.

I'm speaking of course of the Board's decision in Oakwood Healthcare, announced last fall, which revised the standard under the National Labor Relations Act for determining which employees are, in fact, "supervisors". The Oakwood Healthcare decision, which was prompted by the Supreme Court's rejection of a prior standard for determining supervisors in the case of NLRB v. Kentucky River Community Care, Inc., clarified and refined the "supervisor" analysis to conform with the plain text of the National Labor Relations Act.

Under the Board's test and Section 2(11) of the Act, to be considered a supervisor, an employee must exercise one of a specified range of duties; he or she must do so exercising independent judgment; these activities must be exercised in the interest of the employer; and, of particular note, these supervisory duties must be those to which the employee devotes a regular and substantial portion of his or her time. We are not talking about isolated instances, or an employee who occasionally directs the work of a co-worker. We need to be clear about that.

Organized Labor has been highly critical of the Board's Oakwood decision, and labor-allied thinktanks have made a range of claims, which, as we will hear today, range from exaggerated to simply insupportable in fact. This is unfortunate, but perhaps not entirely surprising—long before the Board even issued its decision, Labor had begun a campaign to discredit the upcoming ruling, complete with trumped up allegations that millions of workers would be transformed into supervisors overnight. Not surprisingly—as we will again hear today—this doomsday prediction has not come to pass.

We will also hear from our witnesses today regarding legislation introduced by our Subcommittee Chairman, Mr. Andrews. That bill, H.R. 1644, the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers or so-called RESPECT Act, departs from 60 years of legislation under the National Labor Relations Act and would, in my view, dramatically change the definition of "supervisor" under the National Labor Relations Act. It would remove from the list of supervisory duties such criteria such as "assigning" and "responsibly directing" other personnel—which to me, in many instances, may represent the very definition of "supervisor." Equally important, it would provide that any supervisory employee who spends more than half his or her time doing his own work, rather than supervising others, would not be considered a "supervisor." That's not the test used under a host of other statutes, and represents a significant departure from 60 years of well-settled law.

Finally, I think it is important to note for the record the far-reaching application of Mr. Andrews' bill. While we will hear a lot of testimony today about the classification of supervisors in the health care industry—the "charge nurse" issue—I think we must establish at the outset that neither the Board's Oakwood Healthcare decision nor Mr. Andrews' legislation is limited to that context. Instead, as we will hear from some of our witnesses, H.R. 1644 would change the law and potentially reclassify supervisory employees in a range of industries—from health care to manufacturing to maritime shipping, and beyond.

I look forward to hearing the views of each of our witnesses.

With that, I yield back my time.

Chairman ANDREWS. Thank you very much, Mr. Kline.

I would like to take a moment and introduce the witnesses. Joining us today is Sarah Fox who is a consultant to the AFL-CIO on various legal and policy matters. Ms. Fox is of counsel to the Bredhoff and Kaiser law firm. She previously served on the National Labor Relations Board and was chief Democratic labor counsel to the U.S. Senate Committee on Labor and Human Resources. Prior to that Ms. Fox was in-house counsel to the International Union of Bricklayers and Allied Crafts. She holds degrees from Yale University and Harvard Law School. Welcome.

Lori Gay is a critical care registered nurse at the Salt Lake Regional Medical Center, a position she has held for the past 21 years. In 2002 Lori and her coworkers decided to form a union so they would have a voice in helping deliver safe patient care and earn more respect on the job. The hospital responded by hiring antiunion consultants, pulling nurses off patient care to attend antiunion meetings and claiming that the hospital would be forced to close if workers joined the union.

In May of 2002 the nurses held an election but, unfortunately, the hospital challenged the results, saying that Lori and many of the other organizers were actually supervisors.

The regional National Labor Relations Board eventually ruled that nearly half the nurses were supervisors, and the workers are currently seeking review of this decision by the National Labor Relations Board. Welcome, Ms. Gay.

Roger King is a partner in the law firm of Jones Day, a very excellent law firm, a labor and employment group, and previously served as professional staff counsel to the U.S. Senate Labor Committee. He has practiced labor and employment law for over 30 years, and is active in various trade and professional associations that deal with labor and employment matters. He is a graduate of the finest law school in the United States of America, Cornell Law School. He was the author of the American Hospital Association's brief in the Oakwood Healthcare, Inc., case. Welcome, Mr. King.

I am especially privileged to welcome Bill Tambussi whom I have known since he was a child, more or less. He is a partner in the outstanding law firm of Brown & Connery in New Jersey. He concentrates in labor and employment litigation as well as government affairs and complex litigation. Bill has been certified as a civil trial attorney by the New Jersey Supreme Court since 1991. He represents both public- and private-sector clients, including the County of Gloucester, Lockheed Martin, as well as serving as the special labor and employment counsel to the Camden County Health Services Center, in addition to many other positions he holds. Mr. Tambussi earned his graduate degree from Dickenson College and a law degree from the New England School of Law.

I would also mention he is here today in his capacity as general counsel for the Cooper Hospital University Medical Center, a name that is probably now known across our country. I think most people know that our Governor of New Jersey, Governor Corzine, was involved in a near fatal car accident just a few weeks ago. And Bill, I hope that you would convey to the men and women at Cooper Hospital the great respect we have for the great work they did in healing our Governor and bringing him back to work. I hope you pass that along to the people at Cooper.

Mr. TAMBUSSI. I will do so.

Chairman ANDREWS. Thank you very much.

Let me just explain the rules. We have the written testimony from each of our four witnesses, which will be entered into the official record in the statements' entirety. We would ask each of the witnesses to summarize your remarks in about 5 minutes. In front of you is a light box. When the yellow light goes on it indicates you have 1 minute remaining; when the red light goes on we ask you to wrap up so we can get on to questions from the members.

Without objection, all members will have 14 days to submit additional materials for the hearing record.

So let's begin with Ms. Sarah Fox. Welcome back to the committee and we look forward to your testimony.

STATEMENT OF SARAH FOX, AFL–CIO

Ms. FOX. Thank you very much. As you said, I am counsel to the Washington, DC labor law firm of Bredhoff and Kaiser and I am also a former member of the National Labor Relations Board, having served on the Board by appointment of President Clinton from 1996 through 2000.

I appreciate the opportunity to testify toda, and at the outset I would just personally like to commend the committee for undertaking consideration of not only this matter but also H.R. 800, the Employee Free Choice Act.

The National Labor Relations Act was enacted in 1935, but unlike virtually ever other major New Deal statute, it really has not been periodically revisited and updated by Congress. Despite significant changes in the structure and organization of work that have really transformed labor relations in many industries and significant problems that have developed over time in the administration of the act and particular provisions of the act, because of a kind of impasse, a political impasse at the Federal level between those who would want to reform and those who are against, there really has not been an opportunity to really take a look at what is at this point a 70-year old statute.

And I really do think it is very important that this subcommittee, Chairman Andrews, and others are, through these legislation, these two different bills, really taking a look at this question and giving us an opportunity to really have a debate about the kind of labor law relations system we really want for the 21st century. So, just with that background.

I also want to thank you for taking up this particular issue because of my own experience as a member of the Board. During the 5 years that I was on the Board I would say that the issue of whether particular employees were or were not supervisors was probably the most litigated issue before the Board. I think I would estimate that about one-fourth of the cases we decided in those 5 years involved, in one way or another, questions about whether employees were supervisors.

Over that time I really came to believe, and I will argue today, that there is a fundamental problem with the statute and a fundamental tension between the strict literal words of the statute and the intention of Congress when it enacted this particular provision

in 1947 not to exclude professionals and other skilled employees who, as a matter of course, direct the work of other employees.

So I do think that this is a wonderful opportunity to deal with something that has been festering for a long time.

Let me say, first, why it matters. For purposes of the NLRA, whether a worker is classified as an employee or a supervisor can be an incredibly important matter not just for that worker but for coworkers as well. Obviously, as Chairman Andrews said, someone who is classified as a supervisor has, themselves, no right to engage in collective bargaining, can't have a union, can't bargain over their conditions of work. But being a supervisor means not only that you have no affirmative rights under the act but also that you have no protections under the act.

Because supervisors are not covered by the act, a supervisor can be disciplined or fired for engaging in pro-union activity and a supervisor can be required by their employer to actively participate in the employer's own antiunion activities.

A finding that a particular individual is a supervisor and not an employee can also have a devastating effect on the organizational rights of the other employees in the

workplace. That is because under a 2004 decision by the NLRB, in a case called Harborside Health Care, the participation by a supervisor in pro-union activities can be grounds for setting aside a vote by the employees in support of unionization, even though that supervisor did not—at the time he engaged in that activity, he or she engaged in the activity—know that they were a supervisor, did not consider themselves to be a supervisor; but because of this doctrine of what is called supervisory taint we have had, for instance, a decision in a case called SNE Enterprises last year in which the Board refused to accept the results of an election in which the employees voted in favor of the union because two lead persons whose sole authority over the other employees consisted of the ability to assign workers to different production line tasks had participated in soliciting authorization cards used only to support the filing of a petition for an election.

The Board held that the leads' action on behalf of the union were inherently cohesive even though the leads had participated and voted as employees in three previous NLRB elections, and once their employer informed them that at this point the employer considered them to be supervisors, they had stopped all pro-union activity 3 months before the election.

Chairman ANDREWS. If you could wrap up for us, please.

Ms. FOX. Yes. So I just want to say that it is very important that the committee address this issue today, and I look forward to some discussion with the others about it.

Chairman ANDREWS. Thank you, Ms. Fox.

[The statement of Ms. Fox follows:]

Testimony of Sarah M. Fox

Before the House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
On the RESPECT Act of 2007 (H.R. 1644)

May 8, 2007

My name is Sarah Fox and I am Of Counsel to the Washington DC labor law firm of Bredhoff and Kaiser. I am also a former member of the National Labor Relations Board, having served on the Board by appointment of President Clinton from 1996 through 2000. I appreciate the opportunity to testify today regarding the RESPECT Act (H.R. 1644), which would amend the definition of supervisor in the National Labor Relations Act.

At the outset, let me commend the Subcommittee for undertaking consideration of this bill as well as H.R. 800, the Employee Free Choice Act.

The National Labor Relations Act was enacted in 1935, but unlike virtually every other major federal statute of the New Deal era, it has not been subject to periodic updating and revision by Congress. Despite significant changes in the structure and organization of work that have transformed labor relations in many industries, a host of factors including political impasse at the federal level has prevented serious consideration of reforms to adapt the Act to changing circumstances and to address well-documented deficiencies in the Act's ability to protect the ability of workers to bargain collectively. As law professor Cynthia Estlund has written, the result is that "[t]he core of American labor law has been essentially sealed off - to a remarkably complete extent and for a remarkably long time - both from democratic revision and renewal and from local experimentation and innovation. The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years."[1]

Thanks to the work of the Chairman and others, and with the passage of the Employee Free Choice Act in the House, for the first time in a very long time we are seeing the beginnings of a national conversation about reform of our basic labor law to meet the desires of workers in the 21st Century who want and need collective bargaining as a means to achieve individual opportunity, restore economic fairness and rebuild America's middle class. And one of the areas most in need of reform is the statutory definition of supervisor, which was added to the Act in 1947.

For purposes of the NLRA, whether a worker is classified as an employee or as a supervisor can be a matter of enormous significance, not just for that worker but for her co-workers as well. The most obvious consequence is that workers classified as supervisors have no right to engage in collective bargaining, which means they cannot join and form unions to advance their interests in the workplace unless their employers permit it. But being a supervisor means not only that you have no affirmative rights

[1] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1530 (2002)

under the Act but also that you have no protections. Because supervisors are not covered by the Act, a supervisor can be disciplined or fired for engaging in pro-union activity. And under current Board law, a supervisor can also lawfully be conscripted to participate in the employer's efforts to prevent workers from forming a union.[2]

In today's world of consultant-driven anti-union campaigns, employers typically are taught to use their front-line supervisors as the first line of attack against a union organizing campaign.[3] Supervisors are instructed to express the company's opposition to the union to the employees they supervise and to report to higher management on which employees they know or believe to be union supporters and on any union activity they observe in the workplace. Supervisors can lawfully be told that it is their responsibility to see to it that the unionization effort is defeated, and that their jobs will be on the line if the organizing drive succeeds. Supervisors who express qualms or are seen as insufficiently committed to the anti-union effort can and do lose their jobs.[4]

A finding that a particular individual is a supervisor and not an employee can also have a devastating effect on the organizational rights of the other employees in the workplace. Under a 2004 NLRB decision in a case called *Harborside Healthcare Inc.*[5], the participation by a supervisor in pro-union activities can be grounds for setting aside a vote by the employees in favor of unionization, even if the employer itself vigorously opposed the union and made that opposition known to the workforce. Thus in *SNE Enterprises*[6], decided last October, the Board overturned the results of an election in which the employees voted in favor of the union because two leadpersons—whose sole authority over the other employees consisted of the ability to assign workers to different production line tasks as needed —had participated in soliciting authorization cards used only to support the filing of a petition for an election. The Board held that the leads' actions on behalf of the union were "inherently coercive," even though the leads had voted as employees, without objection, in three previous NLRB elections, didn't regard themselves and weren't regarded by co-workers as supervisors, and ceased their card solicitation three months before the election, when the employer—who had meanwhile actively campaigned against the union—informed them that it considered them to be supervisors

Given the starkness of the consequences of being found to be a supervisor rather than an employee under the NLRA, it is imperative that the definition of supervisor be carefully limited and construed so as to exclude from coverage under the Act only those individuals who are in fact part of management and exercise genuine management prerogatives, and that is in fact what Congress intended when it enacted the supervisory

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[2] *See, e.g.,* Western Sample Book and Printing Co., 209 NLRB 384, 389-90 (1974)

[3] *See* Charles T. Joyce, *Comment: Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. Pa. L. Rev 453 (1987)

[4] Western Sample Book and Printing Co., supra; World Evangelism, Inc., 261 NLRB 609 (1982); Crouse-Hinds, 273 NLRB 333 (1984).

[5] 343 NLRB No. 100 (2004)

[6] 348 NLRB No. 69 (2006)

exclusion more than 50 years ago. And it is equally imperative that the test for determining whether an individual is a supervisor be relatively straightforward and easy to understand and apply, because workers need to know when they undertake a union organizing campaign whether they and their co-workers are employees entitled to the protections of the Act or supervisors whose participation in the organizing campaign would put both their own jobs and the ultimate outcome of the organizing campaign in jeopardy.

Unfortunately, a series of NLRB and court decisions over the last 15 years, culminating last October in *Oakwood Healthcare*[7] and two companion cases[8] issued by the NLRB, have produced a state of affairs that satisfies neither requirement. By broadly construing two of the terms in the statutory definition of supervisor—assignment and responsible direction—the *Oakwood* decisions have greatly expanded the scope of the supervisory exemption, threatening to create a new class of workers who, in the words of the *Oakwood* dissent, "have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."[9] And because the decisions do not resolve the inherent tension between the literal words of the statute and Congress's expressed intent not to exclude supervisors and skilled employees who exercise minor supervisory authority from the statute, they fail to provide the clear guidance that workers need to be able to exercise their rights. Clearly it is time for Congress to step in and provide the clarity that is so desperately needed in this area.

A brief history of the supervisory exemption will help to explain why.

When Congress enacted the National Labor Relations Act in 1935, supervisors were not excluded from coverage under the Act. But in 1947, after the Supreme Court in *Packard Motor Car Co. v. NLRB*[10] upheld an NLRB decision permitting automobile company foremen to form foremen's unions, Congress responded to an outcry from the automobile manufacturers by enacting the so-called Taft-Hartley amendments to the Act, which created an express statutory exclusion for supervisors in what is now Section 2(11) of the Act.[11]

The statutory language enacted by the Taft-Hartley Congress defines a supervisor as an individual who has the authority (1) in the interest of the employer, (2) using

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[7] 348 NLRB No. 37(2006)

[8] Croft Metals, Inc., 348 NLRB No. 38 (2006); Golden Crest Healthcare Center, 348 NLRB NO. 39 (2006)

[9] 348 NLRB at 66.

[10] 330 U.S. 485 (1947)

[11] Although this issue is not addressed by the RESPECT Act, it should be noted that the denial to supervisors of the right to join unions violates the right of freedom of association embodied in the core labor standards that the United States, as a member of the International Labor Organization, is bound to respect. Freedom of association has been held to encompass the right of supervisors to join and form organizations to defend their interests, although a country's law may require supervisors to form unions separate from those of supervised employees. *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006), ¶247.*

independent judgment, (3) to perform one or more of 12 enumerated functions.[12] These enumerated functions include, in addition to such undeniably supervisory responsibilities as hiring, firing and imposing discipline, authority to "assign" and "responsibly to direct" other employees. But Congress made clear, notwithstanding the inclusion of those terms, that it did not intend for the new exclusion to sweep so broadly as to include employees who stand in closer proximity to the rank-and-file than to management even if they are referred to as "supervisors" and have some authority to assign and direct other employees.

Rather, in crafting the definition, Congress sought to distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees, on the one hand"—whom it did not intend to exclude—and "the supervisor vested with. . . . genuine management prerogatives . . . .", whom it did intend to exclude.[13] As Senator Taft explained, the exclusion for supervisors was "limited to bona fide supervisors. . . . to individuals generally regarded as foremen and employees of like or higher rank."[14]

For many decades following enactment of the supervisory exclusion, the NLRB was faithful to Congressional intent, classifying as employees rather than supervisors professionals, journeymen construction workers and other skilled and experienced employees who primarily worked at their profession or craft but also had limited authority to assign work and direct other employees to perform discrete tasks.[15]

Beginning in 1967, when the Board extended its jurisdiction to for-profit hospitals and nursing homes, the Board also had occasion to apply its construction of the

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[12] Section 2(11) states that the term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[13] S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). As the Supreme Court has noted, in enacting the exclusion for supervisors, Congress adopted both the Senate's version of the definition and the Senate's view of what the definition meant. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974). Thus it is the Senate report that reflects Congressional intent with regard to the interpretation of the statutory language.

[14] 93 Cong. Rec. 6442 (1947).

[15] *See, e.g.,* General Steel Tank Co., 81 NLRB 1345, 1347 (1949) (authority exercised by leadman who operates several machines and has one to three helpers assisting him is not supervisory but "merely of the type normally exercised by a skilled workman"); Sonotone Corp., 90 NLRB 1236, 1239 (1950) (although engineers direct the work of the associate and assistant engineers, relationship is "primarily that of the more skilled to the lesser skilled employee rather than that of supervisor to subordinate"); Southern Bleachery and Printworks, Inc. 115 NLRB 787, 791 (1956) (highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees based on their working skill and experience not supervisors).

See also, e.g., Skidmore, Owings & Merrill, 192 NLRB 920, 921 (1971)(architect who as project leader gave directions to others did so only to ensure quality of work on project and, in this capacity, was acting according to professional norms, not supervisory status); Golden-West Broadcaster-KTLA, 215 NLRB 762 n. 4 (1974) (employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor).

supervisor definition to so-called "charge nurses" who, as the Board explained in an early decision, is "the nurse, RN or LPN, on a particular shift who is responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed."[16] Between 1967 and 1974, the Board decided numerous charge nurse cases, generally finding that the charge nurses were not supervisors, either because the nurse's actions were not performed with independent judgment, or in the case of RN's, because they directed others not as an exercise of supervisory power in the interest of the interest of the employer, but as a manifestation of their professional skill and training.[17]

In 1974, when Congress extended the jurisdiction of the Act to cover not-for-profit hospitals, it expressly relied on these and similar decisions by the Board as the basis for rejecting proposals that would have prohibited health care professionals, including registered nurses, from being considered supervisors because of the direction they routinely give to other employees. As the Senate report explained, because the Board, in its decisions, had "carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer," the proposed amendment is "unnecessary."[18]

With this green light from Congress, the Board continued for the next 20 years its relatively consistent practice of interpreting the definition of supervisor so as not to exclude nurses and other professionals whose direction of other employees was "incidental to" the exercise of their professional duties. But the Board's mode of analyzing supervisory issues was thrown into disarray in 1994, by the Supreme Court's 5-4 decision in *NLRB v. Health Care & Retirement Corp. of America,*[19] which rejected the Board's approach as inconsistent with the "plain meaning" of the statutory language notwithstanding its specific endorsement by Congress in 1974.

In the 15 years since the Supreme Court's decision in *Health Care*, controversy over the application of the supervisor definition to nurses and other professionals as well as skilled employees and "team leaders" who provide direction to less skilled or experienced co-workers has split the Board and divided the courts, engendering expensive and wasteful litigation that has contributed greatly to the delays that plague the NLRB election process and depriving workers like Lori Gay of the right to choose

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[16] Abingdon Nursing Center, 189 NLRB 842, 850 (1971)

[17] *See, e.g.,* Madeira Nursing Center, 203 NLRB 323, 324 (1973) (finding that RNs and LPNs who issued work assignments to aides were not supervisors because independent judgment was not required as assignments either were in accord with scheduling issued by director of nursing or were dictated by needs of patients); Doctors Hospital of Modesto, 183 NLRB at 951-52 (distinguishing between nurses who exercise authority as a product of their professional duties and those who are vested with true supervisory authority such as power to affect job and pay status);

[18] S. REP. NO. 93-766, at 6 (1974). See also H.R. REP. No. 93-1051, at 7 (1974) (stating that amendment to supervisor definition is unnecessary given Board's prior precedent).

[19] 511 U.S. 571 (1994)

whether to be represented for purposes of collective bargaining that is supposed to be guaranteed them of the Act.

During the five years in the late 90's that I was a member of the Board, issues relating to whether particular individuals were or were not supervisors were surely the most litigated issues before the agency, accounting by my estimate for at least 25% of all the cases we decided during that period. And since I left the Board in 2000, the issue has been back again to the Supreme Court, resulting in another 5-4 decision in the case of *NLRB v. Kentucky River Community Care Inc.*,[20] in which the Court rejected yet another attempt by the Board to harmonize the literal language of the statute with Congress' expressed intent not to exclude professionals and others with minor supervisory authority from the protections of the Act.

Most recently, in *Oakwood Healthcare* and the companion cases decided last fall, the Bush appointees on the NLRB have essentially abandoned the effort to reconcile the statutory definition with Congressional intent, adopting a reading of the statutory terms that threatens to exclude from coverage countless nurses and other professionals like Lori Gay as well as skilled craft workers who typically direct the work of less skilled employees. But the closeness of these decisions, each of which was decided by a 3-2 vote, is a sure sign that unless Congress steps in, the controversy will continue—particularly if the next administration results in a change in the composition of the Board.

The RESPECT Act would address the problems created by the Supreme Court's decisions in *Health Care* and *Kentucky River* and the Bush Board's *Oakwood* decisions by eliminating from the statutory definition of supervisor the two terms that are most directly in tension with Congress's original intent to exclude as supervisors only those individuals exercising real management prerogatives: assignment and responsible direction. . To deal with additional difficulties created by the failure of the statutory definition to address the status of employees who ordinarily work as rank-and-file employees, but occasionally assume supervisory authority, the bill would also classify as supervisors only those individuals who possess supervisory authority during at least 50% of their work time. Together these changes would bring considerably greater clarity to the question of who is a statutory supervisor.

Most of the 12 enumerated supervisory duties in the current definition of supervisor involve the exercise of real authority to affect employees' terms of employment, such as the authority to hire, transfer, suspend, lay off, recall, promote, reward, and discipline. However, in the *Oakwood* trilogy, the Board radically expanded its construction of the terms "assignment" and "responsible direction" in a way that sweeps in whole classes of employees that Congress clearly did not consider to be supervisors of the type they wanted to exclude from the protections of the Act. .

The Board first defined "assign" in a manner not limited to assignment having a significant impact on employees' terms of employment (for example assignment to a shif or assignment to a particular job), but extending assignment that is as transitory as assigning a patient to a nurse for only the duration of a single shift. The Board then broadly construed the term "direct" to include direction to perform a single, discrete task.

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[20] 532 U.S. 706 (2001)

Congress clearly did not intend for the supervisory exclusion to swallow all professionals and skilled craftspersons who direct the work of aides, assistants and other less skilled personnel, yet that is the logical consequence of the Board's construction of these two terms.

As Judge Posner has observed, "most professionals have some supervisory responsibilities in the sense of directing another's work – the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aid, and so on." [21] But the Taft-Hartley Congress clearly did not intended for this routine assignment and direction by professionals and other skilled employees to lead to their exclusion from the Act's protections as supervisors. Nor was it Congress's intention to exclude skilled construction workers, even though it was fully aware that journeyman construction workers typically work with helpers and apprentices and give them assignments and directions based on the greater skill and experience of the journeyman level craftsperson. Congress was also specific in expressing its intent to protect nurses when it extended the coverage of the Act to proprietary hospitals in 1974. Yet it was fully aware that nurses and other health care professionals routinely give direction to other employees in the exercise of their professional responsibilities.

Since the 1970s, the application of the terms "assign" and "responsibly to direct" has bedeviled the Board, consumed the time of the federal courts of appeal, and twice reached the Supreme Court not only because of the tension between the broad, literal meaning of those terms and the clearly expressed intent of Congress, but also because the inherent ambiguity of those terms. As long as they remain in the definition of supervisor, litigation over their application in particular circumstance is likely to continue to consume significant resources and interfere with the ability of workers to exercise their statutory right

The bill's requirement that individuals classified as supervisors have supervisory authority for at least 50% of their working time will ensure that nurses like Lorie Gay, who serve as charge nurses on a rotating basis, sometimes assigning patients to fellow nurses and other times having patients assigned to them by fellow nurses, and other employees who work some of the time as supervisors will not be stripped of statutory protection unless they spend the majority of their worktime in a supervisory role. This approach, which is used in several state statutes,[22] creates a fair, appropriate and bright-line test for determining whether individuals who sometimes work as rank-and-file employees and sometimes work as supervisors are entitled to the protections of the Act.

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[21] NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983).

[22] Several state public sector bargaining laws contain similar provisions, including Connecticut (Con.. Gen. Stat. § 5-270(f) (position's "principal functions" must be supervisory); Hawaii (Hw. Rev. Stat. § 89-6(c) (must consider whether "a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees"); Illinois (5 Ill. Comp. Stat. 315/3 (r)) ("the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising that authority"); Maine (Me.R.S.A. § 979-E) ("principal functions of the position are characterized by performing [supervisory duties]"); Nevada (Nev. Rev. Stat. § 288.010-222.280 ("exercise of such authority occupies a significant portion of the employee's workday"); New Mexico (N.M. Stat. Ann. § 10-7E-4) ("employee who devotes a majority of work time to supervisory duties").[22]

In the 60 years since Congress added the definition of supervisor to the Act, we have had ample opportunity to observe the impact of its inclusion and to observe the impact it has had on workers and their right to organize and bargain collectively. The reforms proposed in the RESPECT Act will help to put an end to the litigation that, for the last 15 years, has consumed such a substantial proportion of the Board's time and resources. This is a positive and necessary reform, and should be expeditiously enacted.

Chairman ANDREWS. Ms. Gay, welcome to the committee.

STATEMENT OF LORI GAY, REGISTERED NURSE

Ms. GAY. Good afternoon. Thank you for the opportunity to be here today. My name is Lori Gay. I have been a critical care registered nurse for 21 years at Salt Lake Regional Medical Center in Salt Lake City, Utah. I work in the intensive care unit taking care of the hospital's sickest patients. It is a very physical and mentally demanding job.

Every day at our hospital nurses are asked to do more with less, and we struggle to have our voices heard, which is why we decided to form a union. We wanted to protect our patients and ourselves against management making decisions about health care based on the bottom line.

Delivery of safe patient care and winning respect on the job fueled our organizing drive in 2001. After 8 months of campaigning with the United American Nurses and educating nurses in our hospital about what we could accomplish through forming a union, we voted in a National Labor Relations Board election in May 2002.

However, the hospital's owner, Tennessee-based IASIS Healthcare, appealed the election to the regional office of the NLRB in Denver. IASIS argued that the charge nurses, about two-thirds of the nursing staff, were actually supervisors and therefore should be excluded from the bargaining unit. Our ballots were impounded, meaning they were never opened or counted.

We hoped that a favorable ruling from the regional director would result in an order for our ballots to be opened and honored; but, unfortunately, after we got that favorable regional decision, the legal struggle was far from over.

IASIS appealed to the NLRB in Washington, D.C. For 5 years our ballots have remained impounded while we have waited for clarification on what it means to be a supervisor. The ballot I cast in 2002 has never been opened and may never be counted, a fact I now blame more on ambiguous legal language than anything else.

When the Oakwood decisions were released last year the Washington, D.C. NLRB remanded our case back to the regional director. According to the regional director's decision, 64 out of 153 nurses at Salt Lake Regional Medical Center in 2002 were supervisors, including myself. All the RNs in the neonatal intensive care unit were declared to be supervisors, essentially supervising each other on a rotating basis. In the inpatient rehab unit, 10 of the 12 RNs were declared to be supervisors. In the newborn nursery, 10 of the 12 RNs were also declared to be supervisors. In the labor and delivery unit, the ratio of supervisors to nonsupervisory employees was 12 to 5. In the surgical unit the ratio was 10 to 7.

The regional director arrived at these absurd results through an analysis of what it means to perform what is called "charge duty."

I want to talk to you today about what it means to be a charge nurse. Basically, as a charge nurse I am in charge of the pencil. Typically I spend 10 minutes at the end of my shift filling out an assignment sheet for the oncoming shift, making sure that every patient has a bed and a nurse. I record the traffic in and out of the unit. It is simple as that.

I don't have the authority to hire, fire, evaluate or promote other nurses, nor do I have the authority to discipline another nurse for not taking an assignment or for doing an assignment poorly. Any nurse who has been on the job for a year or more is automatically added to the pool of nurses who serve charge duty. There is no application process for the job and there is no job description. Anyone who works there for a year is expected to charge on occasion.

The reality of the situation that we are now dealing with is absurd. Management tells us that only nurses who can safely engage in protected union activity are the nurses who have worked for less than a year, the younger nurses, because they are not serving charge yet, and even those nurses will only be protected for a short time until they start serving charge.

There are some days when I come into work and look around and every nurse on the floor is someone who at some time or another serves as a charge nurse and therefore, according to these absurd rules, is a supervisor. That just doesn't pass the commonsense test. Simply labeling someone a supervisor doesn't make them a supervisor if the institutional structure doesn't support it.

When we serve charge duty, we have a responsibility without authority. When I am designated the charge nurse I still have a full load of my own patients. If there are nurses who have problems with the assignments I make, I refer them to the unit director, who is the real supervisor. He has the power to hire, fire, discipline, evaluate and promote. He also goes to regular managerial meetings that we are not invited or welcome to attend.

The supervisors at my hospital, like the unit director, are paid a salary. They get bonuses and compensation time. When I serve charge duty, I get a dollar more an hour as long as I remember to clock in correctly. All I do is put patients in beds.

At the end of the day, I don't see myself as a supervisor and neither do my colleagues. At our hospital there is a managerial track and there is a clinical track, and as nurses we squarely are within the clinical track. We take care of patients. That is what we do.

I believe that nurses will continue to lose their rights until Congress steps in to establish rules that reflect reality. I am here to ask you to make the law do just that. Nurses like me are not supervisors in the real world. We should be protected. The way things are now, nurses in this country will never have a clear and direct path to having their voices heard, a basic premise of democracy in this country.

That disheartens me because as a nurse for 21 years I believe that what is good for nurses is also what is best for patients. Thank you.

Chairman ANDREWS. Ms. Gay, thank you very, very much.

[The statement of Ms. Gay follows:]

Prepared Statement of Lori Gay, Registered Nurse

Good Afternoon. Thank you for the opportunity to be here today. My name is Lori Gay. I have been a critical care registered nurse for 21 years at the Salt Lake Regional Medical Center (SLRMC) in Salt Lake City, Utah.

I work in the intensive care unit, taking care of the hospital's sickest patients. It is a very physically and mentally demanding job, but I wouldn't trade it for the world. I am passionate about improving the practice of nursing.

Everyday at our hospital, nurses are asked to do more with less, and we struggle to have our voices heard, which is why we decided to form a union. We wanted to protect our patients and ourselves against management making decisions about health care based on the bottom line. Dedication to our patients and the desire to get the job done right fueled our organizing drive in 2001.

After eight months of knocking on doors with the United American Nurses to talk to the nurses in our hospital about what we could accomplish through forming a union, we voted in an NLRB representation election in May 2002.

However, the hospital's owner, Tennessee-based IASIS Healthcare, appealed the election to the regional office of the NLRB in Denver. IASIS argued that the charge nurses—about 2/3 of the nursing staff—were actually supervisors and should therefore be excluded from the bargaining unit, even though all the charge nurses rotated in and out of charge while still carrying a full patient load. Our ballots were impounded—meaning they were never opened or counted.

We hoped that a favorable ruling from the regional director would result in an order for our ballots to be opened and honored, but unfortunately after we got that favorable regional decision, the legal struggle was far from over. IASIS appealed to the NLRB in Washington, D.C.

For five years, our ballots have remained impounded while we have waited for clarification on what it means to be a supervisor. The ballot I cast in 2002 has never been opened and may never be counted—a fact I now blame more on ambiguous legal language than anything else.

When the Oakwood decisions were released last year, the Washington, D.C., NLRB remanded our case back to the regional director. According to the regional director's decision, 64 out of 153 nurses at the Salt Lake Regional Medical Center in 2002 were supervisors, including myself.

All the RNs in the neonatal intensive care unit were declared to be supervisors, essentially "supervising" each other on a rotating basis. In the inpatient rehabilitation unit, 10 of the 12 RNs were declared to be supervisors. In the newborn nursery, 10 of 12 RNs were also declared to be supervisors. In the labor and delivery unit, the ratio of supervisors to non-supervisory employees was 12 to 5. In the surgical unit, the ratio was 10 to 7.

The regional director arrived at these absurd results through an analysis of what it means to perform what is called "charge" duty.

I want to talk to you today about what it means to be a "charge nurse." Basically, as charge nurse, I am in charge of a pencil. Typically, I spend 5 minutes at the beginning of the shift filling out an assignment sheet, making sure that every patient has a bed and a nurse. I record the traffic in and out of the unit—it's as simple as that. I don't have the authority to hire, fire, evaluate or promote other nurses, nor do I have the authority to discipline another nurse for not taking an assignment, or for doing an assignment poorly.

I can't speak for every arrangement at every hospital, but at my hospital, taking charge duty is what we do to pitch in and help out, and we are expected to take it once in a while. It's just part of the job.

Any nurse who has been on the job for a year or more is automatically added to the pool of nurses who serve charge duty. There is no application process for the job. And there is no job description. Anyone who works there for a year and learns the ropes is expected to do it.

The reality of the situation that we are now dealing with is absurd. Management tells us that the only nurses who can safely engage in protected union activity are the nurses who have worked for less than a year—the younger nurses—because they are not serving charge yet. And even those nurses will only be protected for a short time—until they start serving charge.

There are some days when I come into work and look around and every last nurse on the floor is someone who at some time or another serves as a charge nurse and therefore, according to these absurd rules, is a "supervisor." Now, that just doesn't pass the common sense test. How can we all be supervisors of each other, depending on who is randomly selected to do charge that day? Everybody here in this room knows that is just not how it works in the real world.

Simply labeling someone a supervisor doesn't make them a supervisor in the true sense of the word if the institutional structure doesn't support it. When we serve charge duty, we have responsibility without authority. We cannot and do not throw our weight around with other nurses, because we do not have that kind of authority. The only way the system of rotating charge duty works is through goodwill and cooperation among the nurses. We get the work done thanks to collegiality and collaboration.

When I am designated charge nurse, I still have a full load of my own patients. If there are nurses who have problems with the assignments I make, I refer them to the Unit Director, who is the real supervisor. The real supervisors at my hospital are paid a salary, and they get bonuses. When I serve charge duty, I get a dollar more an hour—as long as I remember to clock in correctly. The real supervisors hire, fire, discipline, evaluate and promote. All I do is put patients in beds.

At the end of the day, I don't see myself as a supervisor, and neither do my colleagues. At our hospital, there's a managerial track and there's a clinical track—and as nurses we are squarely within the clinical track. We take care of patients. That's what we do.

Management doesn't see us as supervisors either. They have regular managerial meetings, and we are not invited or welcome at those meetings.

I have been on this journey for many years now, and I can tell you that there will be no clear path to justice until Congress intervenes to solve the problem once and for all. It shouldn't be this legally convoluted and complicated to make a democratic choice to form a union.

Of course, I am not a lawyer, I am a nurse, but I think nurses will continue to lose their rights until you step in to establish rules that reflect reality and make sense to everyone. We can't afford to wait for years and years of continued litigation, with no likelihood of clarity at the end of the process.

All nurses should be able to know whether they will be protected if they engage union activity before they attempt to form a union, not after the fact. I'm here to ask you to make the law reflect the obvious reality that nurses like me just aren't supervisors in the real world. We should be protected.

The way things are now, nurses in this country will never have a clear and direct path to having their voices heard—a basic premise of democracy in this country. And that disheartens me because as a nurse for 21 years, I believe that what is good for nurses, is also what's best for patients.

Chairman ANDREWS. Mr. King, welcome to the committee.

STATEMENT OF ROGER KING, JONES DAY, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. KING. Mr. Chairman, members of the committee, thank you for having me. I appear here today on behalf of the United States Chamber of Commerce, the HR Policy Association and the Society for Human Resource Management, or SHRM. And as this committee is well aware, those organizations and their respective members represent a substantial portion of the employers in this country and millions of employees. I can say without any hesitation that we are concerned about the legislation that the Chairman has introduced. We believe it is not only technically in error, but also would cause serious harm to employers in this country. And I will get into that in my overview of my testimony.

I think at the outset what we need to focus on is that this legislation is just not about health care; it would impact all employers in the country and particularly small and medium-size employers that often utilize employees both in a supervisory capacity and in a nonsupervisory capacity. They simply need to have individuals function in those dual roles to serve their legitimate business purposes.

The criticism that is being labeled unfair, unjust, not following the law, as attributed to the present National Labor Relations Board, is also I would submit in serious legal and factual error.

Twice the United States Supreme Court has directed the National Labor Relations Board to look at section 211 of the act and to refine its analysis and to make it more predictable and indeed to follow the legislative mandate that traces back to 1947.

Not only have two decisions of the United States Supreme Court seriously criticized past National Labor Relations Board, but they have directed that the Board do something about these errors. A great number of United States courts of appeal have also leveled similar criticism. So we have objective judicial review of this issue, and we have had a very strong signal sent by not only the United States Supreme Court, but various courts, that the National Labor Relations Board needs to do a better job in this area. So that is the history really.

The history going back—as Ms. Fox has in her testimony and I have in mine—goes back to 1947, the Taft-Hartley amendments. The predecessor to Taft-Hartley was the Wagner Act. Supervisors were not defined. We had a great deal of turmoil in this country because we didn't have a demarcation line between who was management and who isn't.

Irrespective of how we may feel ultimately about this issue, we all would agree, I hope, that an employer needs to have a sufficient number of supervisors to run its business. If you can't do that, you can't function. You couldn't run your congressional offices without some direction, some control. The same is true in the private sector. We have to have a satisfactory number of supervisors.

That very delicate and difficult equilibrium was reached in 1947, and I would ask the subcommittee to be very careful before you disturb those many, many years of history with Taft-Hartley and what went into those amendments. A very delicate and important compromise was reached.

Finally, if an employer does not have the requisite number of supervisors to run its business, it is going to have a difficult time complying with the many laws that this body enacts and indeed the State legislative bodies and municipal government impose upon employers.

Oftentimes that first-line supervisor is the difference between complying with OSHA, with Fair Labor Standards Act, and a whole host of other Federal and State legislative enactments. If you don't have, as an employer, control over the workplace, compliance in those areas could be highly suspect.

With respect to some of the criticism that has been directed to the National Labor Relations Board I would just like to make a few comments. First of all, the so-called findings by the Economic Policy Institute, the so-called Washington think tank, predicted before—I want to underline before—before these decisions even issued that millions of workers were going to be reclassified from nonsupervisory status to supervisory status. How you can make that prediction before the case is even issued is, of course, a difficult question to answer.

But beyond that we have not had millions of people being impacted. In fact, I just checked with the National Labor Relations Board yesterday. Only four cases were unit clarification petitions that have raised the Kentucky River issue. There is a very small minority of representation cases.

In closing I want to emphasize that we have heard a lot about Kentucky River. Less than 7 percent, ladies and gentlemen, of the employees at issue in those three cases where the issue was were these supervisors are not, less than 7 percent were found by this National Labor Relations Board to be supervisors, and in fact most of the employees were found not to be supervisory, including nurses.

So in summary, Mr. Chairman, we don't believe there is a case that can be made for this legislation. We think the criticism of the National Labor Relations Board is factually and legally inaccurate. We have attached to the presentation a substantial study of cases going back to 1995 that supports our position. Thank you very much.

Chairman ANDREWS. Thank you, Mr. King.

[The statement of Mr. King follows:]

JONES DAY

TESTIMONY OF
U.S. CHAMBER OF COMMERCE

THE HR POLICY ASSOCIATION

THE SOCIETY FOR
HUMAN RESOURCE MANAGEMENT (SHRM)

By G. Roger King[1]

Jones Day

H.R. 1644-The Re-Empowerment of Skilled and Professional Employees in Construction Tradeworkers Act

The United States House of Representatives

Committee on Education and Labor – Subcommittee on Health, Employment, Labor and Pensions

"Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?"

May 8, 2007

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[1] Mr. King (gking@jonesday.com) is a partner in the Jones Day Labor and Employment Group. Mr. King wishes to acknowledge the assistance of his associates Rebekah Bennett, Joseph Bernasky, David Birnbaum and Yasmin Yanthis-Bailey, members of the Jones Day Labor and Employment Group, in preparing this testimony. Jones Day was counsel to *Amici*, the U.S. Chamber of Commerce, the Society for Human Resource Management and the Ohio Hospital Association in the *Kentucky River* Trilogy of cases recently decided by the National Labor Relations Board. Mr. King, who served as Professional Staff Counsel to the United States Senate Labor Committee prior to entering private practice, has spoken and written extensively on supervisory issues under the National Labor Relations Act. *See, e.g.*, G. Roger King, *Where Have All The Supervisors Gone?—The Board's Misdiagnosis of Health Care Retirement Corp.*, 13 Lab. Law 343 (1997) (noting the prior Boards' continued manipulation of Section 2(11)'s definition of a "supervisor" following *HCR*); G. Roger King and David Birnbaum, *Kentucky River Trilogy: Recent NLRB Decisions Clarify the Definition of the Term "Supervisor" Under the NLRA*, HR Advisor: Legal & Practical Guidance, Vol. 13, No. 1 (2007).

I. OVERVIEW

Good afternoon Chairman Andrews, and Members of the House Health, Employment, Labor and Pensions Subcommittee. My name is G. Roger King, and I am a partner in the Jones Day law firm. Jones Day is an international law firm with 2,200 lawyers practicing in 30 offices located both in the United States and throughout the world. We are fortunate to count more than 250 of the Fortune 500 employers among our clients. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers. I am testifying today on behalf of the U.S. Chamber of Commerce, the HR Policy Association, and The Society for Human Resource Management ("SHRM") (collectively, the "Associations"), whose members collectively represent a substantial portion of this country's employers, and employ millions of American workers.

- The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

  More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

  Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

  Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

- HR Policy Association consists of chief human resource officers representing more than 250 of the largest corporations in the United States, collectively employing nearly 18 million employees worldwide. One of HR Policy's principal missions is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the workplace.

- The Society for Human Resource Management ("SHRM" or "Society") is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission

is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

The title of today's hearing is, *"Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?"* and, in addition to the subjects noted in such title, also includes a review of H.R. 1644, introduced by Chairman Andrews and other members of this Body.[2] This legislation, which is titled the "Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act" or the "RESPECT Act", would amend Section 2(11) of the National Labor Relations Act ("NLRA" or the "Act") (29 U.S.C. 152(11)) by:

- inserting the phrase "and for a majority of the individuals worktime" after the phrase "interest of the employer";
- striking the word "assign"; and
- by striking the phrase "or responsibility to direct them" [Section 2(11) of the NLRA states, "or responsibly to direct them" and apparently, H.R. 1644 contains a drafting error on this point].

Further, it is my understanding that H.R. 1644 is being proposed as a response to certain National Labor Relations Board ("NLRB" or "Board") decisions in the following cases: *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); commonly known as the *Kentucky River* Trilogy of cases. These cases, as the Subcommittee is well aware, concern the application of Section 2(11) of the NLRA to certain individuals in the workplace including, most particularly, nurses and leadpersons in a manufacturing facility.

At first glance, the NLRA amendments proposed in H.R. 1644 would appear to be of slight importance to our Nation's labor laws given their brevity and simplistic wording. Such a conclusion, however, would be erroneous. First, the suggested amendments to Section 2(11) are not, as some have suggested, simply a "correction" of the Board's *Kentucky River* Trilogy of cases. Second, H.R. 1644, if enacted, would negatively impact a wide variety of employers, not just the healthcare industry. Third, based upon an extensive review of federal court of appeals and NLRB decisions from 1995 to present, a case cannot be made to support the H.R. 1644 amendments – indeed, in a majority of the decisions of the courts and the Board since 1995 construing Section 2(11), the employees at issue were not found to be statutory supervisors. Fourth, the proposed amendments to the NLRA, if enacted, would seriously disturb the necessary but delicate equilibrium between management and labor in determining the scope and authority of employers' supervisory workforce. Indeed, H.R. 1644 would especially hurt small and medium businesses, and other employers, who utilize their supervisory workforce to concurrently perform Section 2(11) duties and also non-management functions. In a unionized setting, absent agreement from the union in question, such individuals would be precluded from

[2] A similar bill has been introduced by Senator Dodd in the other Body, Senate 969.

performing non-supervisory or bargaining unit work and employers would have to hire additional employees given such conflict or forego a portion of their business operation all together.

Establishing the appropriate "demarcation" labor law lines between management and non-management employees is extremely important from both a public policy and statutory perspective. The Congress in 1947, in enacting the Taft-Hartley amendments, clearly understood this important balancing and, indeed, spent considerable time and great care in drafting and enacting Section 2(11). Indeed, it is particularly helpful to review the historical context in which Section 2(11) came into being. The Congress, in reacting to labor strife and an imbalance of power in the workplace under the Wagner Act, spent considerable time in formulating a statutory framework to place employees either in a management category or in a non-management category. This Subcommittee should carefully study the history behind the enactment in 1947 of the Taft-Hartley amendments before proceeding with changes with respect to the NLRA generally, and specifically with respect to Section 2(11) of the Act.

If the delicate and appropriate balance of power is not maintained in deciding which employees belong in the management ranks and which employees should be excluded, employers of all types will have considerable difficulty in effectively and efficiently running their businesses and achieving appropriate objectives. Stated alternatively, if such balance of power tilts too far in one direction or the other, the Nation's economy can be severely and adversely impacted resulting not only in increased labor strife, but also in serious economic losses occurring. Employers ultimately must have the complete loyalty of a sufficient number of "supervisors" in their respective workforces if they are to deliver products, goods and services in an effective, productive and safe manner. Given the increasing global competition that this Country faces, this delicate balance of power in the workplace is even more critical to preserve today than perhaps it was in 1947.

Establishing the appropriate line between management and non-management employees is also exceptionally important for statutory compliance reasons. Indeed, under the NLRA alone, determination of who is and who is not a supervisor is at the very core of the Act and has many significant implications. For example "supervisory" status findings determine who:

- can form, join, or assist labor organizations;
- is eligible to vote in Board-conducted representation elections;
- can circulate decertification petitions and who is permitted to vote in a decertification election to remove a union; and
- has the right to boycott their employers, or engage in work stoppages.

Further, individuals who are determined to be supervisors are generally considered to be legal agents of their employers and, as such, an employer is bound by their acts including the potential of an adverse finding for such acts under the NLRA.

A determination of supervisory status also has important ramifications under other statutes. For example, an employer's supervisors, who, as noted above, are its legal agents, are often in large part responsible for an employer's compliance in such areas as:

- Occupation Safety and Health Act rules and regulations;
- Federal and state requirements to provide a workplace free of sexual and other harassment;
- Federal and State leave statutes, including the Family Medical Leave Act;
- Anti-discrimination statutes;
- Minimum wage and overtime requirements under the Fair Labor Standards Act; and
- A whole host of other federal and state labor and employment statutes, rules and regulations.

If an employer does not have the ability to select, control and demand the loyalty of such individuals, it will have considerable difficulty in complying with our Nation's labor and employment laws.

The legislation before the Subcommittee today has been interpreted by certain individuals, as noted above, as an effort to simply address perceived "overreaching" and incorrect analysis by the NLRB in the *Kentucky River* Trilogy of cases. Such a conclusion, however, it is submitted, is incorrect. The bill before the Subcommittee today goes considerably further than reacting to three recently decided NLRB cases, and would seriously damage the important equilibrium established in Section 2(11) of the Act in determining who is and who is not a part of management. Indeed, the Board has been unjustly criticized from certain quarters regarding these decisions. For example, only 12 out of between 168 and 178 employees being reviewed in these cases were found to be statutory supervisors; that is to say, less than 7% of the employees at issue in the *Kentucky River* Trilogy of cases were found to be Section 2(11) supervisors.[3] The prediction by the Economic Policy Institute ("EPI") and other organizations that millions of employees would suddenly be reclassified from non-supervisory status to Section 2(11) supervisory status is simply not only factually inaccurate, but also without any legitimate theoretical predicate.[4] Based on discussions with various types of employers throughout the

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[3] The total number of employees at issue in *Oakwood*, 348 NLRB No. 37, was 124. The total number of employees at issue in *Golden Crest*, 348 NLRB No. 39, was 19, and in *Croft Metals*, 348 NLRB No. 38, the number of employees at issue was between 25 and 35. Ultimately, only 12 permanent charge nurses in *Oakwood* were held to be statutory supervisors.

[4] *See* Economic Policy Institute Issue Brief #225, July 12, 2006 (http://www.epi.org/content .cfm/ ib225); *see also* Ross Eisenbrey, *Millions to Lose Overtime Pay*, The Montan Standard, August 17, 2004 (http://www.epi.org/content.cfm/webfeatures_viewpoints_OT_pay_loss); Ross Eisenbrey, *Longer Hours, Less Pay, Labor Department's new rules could strip overtime protection from millions of workers*, Briefing Paper #152, July 2004 (http://www.epi.org/content.cfm/briefingpapers_bp152); Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay, Department of Labor proposal means lower pay, longer hours for millions of workers*,

Country, including those of the Associations, and a review of NLRB case filings after the issuance of the *Kentucky River* Trilogy of cases, there have been virtually no employer initiated actions to reclassify employees from non-supervisory to Section 2(11) supervisory status under the Act.[5] In fact, a number of employers and unions have stipulated in their collective bargaining agreements not to challenge current bargaining units under the precedent set forth in the *Kentucky River* Trilogy of cases.[6] Moreover, the NLRB itself has recognized the limited impact the *Kentucky River* Trilogy of cases has had – despite any predictions to the contrary.[7]

(continued…)

Briefing Paper #139, June 26, 2003 (http://www.epi.org/content.cfm/briefingpapers_flsa_jun03); and other articles published by EPI (http://www.epi.org), predicting that hundreds of thousands of workers would be reclassified from non-exempt to exempt status as a result of proposed regulations to the Fair Labor Standards Act by the United States Department of Labor. There have been no studies or data to support such sensationalistic and inaccurate prediction.

[5] Indeed, there has been arguably only one significant NLRB Regional Director decision on remand from the Board in light of the *Kentucky River* Trilogy of cases that has resulted in the reclassification of previously classified non-supervisory employees to Section 2(11) status. *See Salt Lake Regional Medical Ctr., Inc*, Case No. 27-RC-8157 (Region 27, Feb. 20, 2007). On remand, the Regional Director for NLRB Region 27 found that, of a total of eighty-eight nurses, sixty-four (or 73%) qualified as supervisors under Section 2(11) in light of the Board's recent rulings. The Regional Director came to such conclusion by way of the test for analyzing supervisory status under Section 2(11) – namely whether (i) the employee at issue has authority to engage in one of the twelve statutory criterion; (ii) the employee's performance of such activity is not routine or clerical, but exercised with independent judgment; and (iii) the employee spends a regular and substantial portion of his or her time engaging in such supervisory activity. (The issue of whether such activity was performed in the interest of the employer was apparently not at issue in the case.)

On remand, the employer only advanced evidence that the charge nurses had authority to assign duties to other nurses, and did so through the exercise of their independent judgment. The Regional Director found that the charge nurses had "full authority" to assign nurses and aids to particular patients, that such assignments which were rarely questioned by the staff, and that the record indicated that the employer took action against at least one employee who did not want to accept an assignment from a charge nurse. The Regional Director further found that the charge nurses *exercised independent judgment* in making such assignments because they considered a variety of factors, including the skill set of available staff members, the conditions and medical needs of the patients, the patients' personal preferences, and the personalities of the staff – all without any control by or detailed policy or instruction from the employer. Finally, the Regional Director held that, of the eighty-eight nurses at issue, sixty-four worked *regularly and substantially* in the charge nurse position because they worked at least ten percent of their time in the charge nurse positions, but "*the great majority of them worked considerably more than 10% of their time in the charge nurse position, and … they worked as charge nurse on a regular and recurring basis over numerous pay periods* …." (emphasis added) Accordingly, the ultimate issue in this case was the question of whether the nurses at issue met the independent judgment test, a part of Section 2(11) that is not touched by H.R. 1644.

[6] *See, e.g., RNs at Two California Hospitals Gain Pay Increases and Job Security Provisions*, Collective Bargaining Newsletter, 12 COBB 43, April 12, 2007 (noting that the collective bargaining agreements for registered nurses at Stanford Hospitals & Clinics and Lucile Packard Children's Hospital in Palo Alto, California include language prohibiting the hospital from relying upon the *Kentucky River* Trilogy of cases to challenge the status of anyone currently in the bargaining unit); *NLRB Members Discuss Effects of Oakwood, Pending Cases*, Collective Bargaining Newsletter, 12 COBB 23, February 15, 2007 (noting a similar agreement between Kaiser Permanente and the unions representing its employees); *Las Vegas Hospital Accords Expand Staffing Protections*, Collective Bargaining Newsletter, 12 COBB 20, February 15, 2007 (noting similar language in the new contracts between the Service Employees International Union and Valley Hospital Medical Center and Desert Springs Medical Center in Las Vegas, Nevada); *Massachusetts Nurses at Two Hospitals Gain Wage Increases, Protected Job Status*, Collective Bargaining Newsletter, 11 COBB 145, December 7, 2006 (noting that Brigham and Women's Hospital and the Massachusetts Nurses Association included a provision in their contract that the hospital would not

A further fallacy with respect to certain initial analysis of H.R. 1644 is that it primarily would only have an impact on the healthcare industry. To be sure, the proposed amendments to the Act would seriously harm the definition of who is a supervisor in the healthcare workplace.[8] Such amendments, however, as noted in the appendices to this testimony, would potentially impact many different types of employers in the Country and impede their ability to successfully assemble a necessary "supervisory" workforce.[9]

Finally, in the short amount of time available to prepare for this hearing, we have reviewed the significant decisions issued by the United States Courts of Appeal and the NLRB from 1995 – the year after the United States Supreme Court handed down its decision in *NLRB v. Healthcare Retirement Corporation* ("*HCR*"),[10] the first lead Supreme Court case construing Section 2(11) – to the present (there are in excess of 1,500 Board and court cases in this time period that mention Section 2(11)). Based upon our analysis of these cases, the following conclusions can be reached:

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challenge the bargaining unit status of any employee based on the *Kentucky River* Trilogy of cases); *RN Union rights Protected Under Toledo Hospital Accord*, Collective Bargaining Newsletter, 11 COBB 134, November 9, 2006 (noting that the contracts between the United Auto Workers and St. Vincent Mercy Medical Center in Toledo, Ohio contained a similar provision).

[7] NLRB Member Dennis P. Walsh (D) stated that the NLRB has not received many unit clarification petitions after deciding the *Kentucky River* Trilogy of cases, and Member Peter N. Kirsanow (R) stated that the *Kentucky River* Trilogy of cases "is 'not going to have the kind of dramatic impact on supervisory status as some had thought before the decision was issued.' It is 'not an easy proposition' for management to exclude employees from the bargaining unit by making them supervisors …." *NLRB Members Discuss Effects of Oakwood, Pending Cases,* Collective Bargaining Newsletter, 12 COBB 23, February 15, 2007.

[8] *See* May 4, 2007 letter from the American Hospital Association and the American Organization of Nurse Executives to the Honorable Howard P. McKeon and the Honorable George Miller opposing H.R. 1644.

[9] *See, e.g., Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003) (maintenance supervisor was found to be a 2(11) statutory supervisor. "[T]he employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor.") (citing *NLRB v. Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967)); *Progressive Transp. Servs., Inc.*, 340 NLRB No. 126 (2003) (deck lead supervisor who had the authority to recommend discipline was 2(11) statutory supervisor even though she performed all of the duties performed by the non-supervisor dispatchers); *Heartland of Beckley*, 328 NLRB No. 156 (1999) (licensed practical nurses ("LPN's") were 2(11) statutory supervisors because they had authority to discipline); *Pepsi-Cola Co.*, 327 NLRB No. 183 (1999) (account representatives who had authority to discharge were 2(11) statutory supervisors even though they may spend about 60 to 90% of their time performing to same tasks as non-supervisor merchandisers); *Beverly Enters. v. NLRB*, 166 F.3d 307 (4th Cir. 1999) (LPN's were 2(11) supervisors under the act because they exercised at least some independent judgment in assigning and disciplining for "almost one-half of their working hours"); *Beverly Enters. v. NLRB*, 165 F.3d 290 (4th Cir. 1999), (LPN's who were found to be were supervisors were the most senior staff working almost two-thirds of the time they worked); *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998) (LPN's who spent over two-thirds of their working time as the highest ranking employee and exercised independent judgment in assigning and disciplining were 2(11) supervisors); *see also, NLRB v. Attleboro Assoc. Ltd.*, 176 F.3d 154 (3rd Cir. 1999); *Integrated Health Servs. of Mich., at Riverbend, Inc. v. NLRB*, 191 F.3d 703 (6th Cir. 1999).

[10] 511 U.S. 571, 114 S.Ct. 1778 (1994).

- Many types of industries and businesses, not just healthcare, have been involved in litigation construing the application of Section 2(11) of the NLRA;

- The majority of United States Court of Appeals and Board decisions that have applied Section 2(11) have found that the employees in question are not statutory supervisors;

- The NLRB prior to its decision in the *Kentucky River* Trilogy of cases, was criticized twice by the United States Supreme Court, and also by a number of the United States Courts of Appeals, for its inconsistent and often result oriented approaches in applying Section 2(11) of the NLRA.

II. HISTORY OF SECTION 2(11) OF THE NLRA AND THE TAFT-HARTLEY AMENDMENTS

The conclusion of World War II was not only the beginning of a period of great prosperity for this Country, but also brought about considerable labor unrest. Many industries and their workers had been under the strict control of the War Labor Board and correspondingly had been constrained with respect to wage and benefit adjustments. When such controls were lifted after the War, a considerable number of work stoppages occurred. One of the problems identified in such settings was that a substantial portion of the workforce that many considered to be management employees became embroiled in strikes and other confrontations with their respective employers. Indeed, the Wagner Act provided virtually no guidance on who was a supervisor or part of management. This statutory void in part lead to the enactment of the Taft-Hartley Amendments to the NLRA in 1947. In discussing the supervisory issue, which became an important part of the Taft-Hartley Amendments, Senator Robert Taft, for instance, stated that "it is impossible to manage a plant unless the foremen are wholly loyal to the management."[11] The Senate Committee on Labor and Public Welfare noted that "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."[12]

Although it was the Senate's definition of the term "supervisor" that was ultimately included in the Act, it is important to note that similar statements regarding the importance of supervisor loyalty were made in the House of Representatives. For instance, the House Committee on Education and Labor noted that employers, "as well as workers, are entitled to loyal representatives in the plants, but when the foreman unionize . . . they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."[13] The House Committee concluded that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or

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11 93 Cong. Rec. 3952 (daily ed. April 23, 1947).

12 S. Rep. No. 80-105, at 3 (1947).

13 H.R. Rep. No. 80-245, at 14 (1947).

one whom, for any reason, he does not trust."[14] Importantly, the House Committee specifically listed "[d]octors, nurses, [and] safety engineers" as examples of the types of positions that must remain fully faithful to the interests of the employer, and not the unions.[15]

As Congress envisioned, supervisors with divided loyalties will be less effective to perform proper management functions and to carry out the business purposes of their employers. Section 2(11) thus seeks to ensure that employers have in place a reliable supervisory team to maintain efficient operations in their facilities. This is the policy that drives Section 2(11), and it is the policy that is espoused in the text of the Act.[16] In short, this is the policy to which the Board and the courts must adhere to in all events.[17]

Prior to passing the Taft-Hartley Act, Congress considered – and rejected – arguments that the language chosen for Section 2(11) was too broad and excluded too many persons from the Act's protections. The Minority Report from the House Committee on Labor and Education complained that although Congress had purported:

> to define the meaning of "supervisor," actually, supervisors play only a minor role in this definition, which includes all persons having only slight authority such as pushers, gang bosses, leaders, second hands, and a host of similarly placed persons with no actual supervisory status. It is sufficiently broad to cover a carpenter with a helper.[18]

Indeed, prior to the passage of the Taft-Hartley Act, the Board defined supervisors as those who "supervise or direct the work of other employees …, *and* who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees."[19] As the Supreme Court pointed out, "[t]he 'and' bears emphasis because it was a true conjunctive: The Board consistently held that employees whose only supervisory function was directing the work of other employees were not 'supervisors' within its test."[20] The Board's pre-Taft-Hartley Act definition of supervisor thus bears one striking difference with the one found in Section 2(11): "Whereas the Board [previously] required a supervisor to direct the work of other employees *and* perform another listed function, the [Taft-Hartley] [A]ct permit[s] direction alone to suffice."[21] As the Board pointed out in the *Oakwood* decision, "Senator Flanders, who offered the amendment adding the phrase 'responsibly to direct' to Section 2(11), believed that the

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[14] *Id.* at 17.

[15] *Id.* at 16.

[16] *See NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1213, 1217 (7th Cir. 1996).

[17] *See, e.g., Providence Hospital*, 320 NLRB 717, 726 (1996) (acknowledging the Supreme Court's mandate that the text of Section 2(11) must drive Board policy, "not the other way around").

[18] H.R. Rep. No. 80-245, at 71 (1947).

[19] *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 718, 121 S.Ct. 1861 (2001) (citing *Douglas Aircraft Co.*, 50 NLRB 784, 787 (1943)).

[20] *Id.* (citing as examples *Bunting Brass & Bronze Co.*, 58 NLRB 618, 620 (1944) and *Duval Texas Sulphur Co.*, 53 NLRB 1387, 1390-91 (1943)).

[21] *Id.* at 719.

amendment addressed an element of supervisory status missing from an earlier amendment, which included 'assign' as 1 of 11 supervisory functions."[22] Thus, there can be no dispute that, even in 1947, Congress was aware of concerns as to the breadth of Section 2(11).[23] Nevertheless, Congress chose to adopt the provision – including the terms "assign" and "responsibly to direct" – plainly believing that its language was appropriate and needed to establish the proper balance between management and labor in the workplace. Correspondingly, however, the Congress, in 1947, excluded from supervisory status "straw bosses," "leadmen," and similar persons.

III. RECENT LITIGATION INVOLVING SECTION 2(11) OF THE NLRA

The Board, over the years, has often been accused of inappropriately taking a results-oriented approach to interpreting who is, or is not, a supervisor under Section 2(11). Commentators have noted that this inconsistent application of the definition of a supervisor has been quite favorable to organized labor: Often, in Board cases, "borderline individuals were found to be supervisors when that determination had the effect of attributing liability to an employer for an individual's actions . . . . In contrast, borderline individuals were found to be employees when that determination protects them from an employer's sanction."[24] Likewise, a number of courts of appeals have been critical of the Board's approach to interpreting Section 2(11).[25] For example, the United States Court of Appeals for the Fourth Circuit stated: "We are not the first court to wonder whether [the Board's] new interpretation [of independent judgment] is an end run around an unfavorable Supreme Court decision in order to promote policies of

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[22] 348 NLRB No. 37 (citing NLRB, Legislative History of the Labor Management Relations Act of 1947, 103-104).

[23] As previously noted, Congress ultimately adopted the Senate's version of Section 2(11). Nevertheless, while the House's version included as supervisors persons such as labor relations personnel and confidential employees, it was similar to the Senate's in that it defined a supervisor to include those with the authority to "hire transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline." H.R. 3020, as reported, at Sec. 2(12)(A) (1947) (emphasis added). As such, the House Minority Report's critique may fairly be said to have encompassed the Senate's version as well.

[24] Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713-27 (1981). *Politics Not As Usual: Inherently Destructive Conduct, Institutional, Collegiality and The National Labor Relations Board,* 32 Fla.St. U.L.Rev. 51 (2004), and *The Supreme Court's Rejection of Excluding "Ordinary Professional or Technical Judgment" As Independent Judgment When Directing Employees: Does Kentucky River Mean Lights Out for Mississippi Power?,* Kenneth R. Dolin, 18 Lab. Law 365 (2003).

[25] *See, e.g., Integrated Health Servs. of Mich.*, 191 F.3d at 707 (noting the Board's "'unique' misapprehension of the manner in which § 2(11) applies to nurses"); *Attleboro Assocs.*, 176 F.3d at 160 (noting the Board's "biased mishandling of cases involving supervisors") (internal quotations and citations omitted); *Spontenbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2nd. Cir. 1997) (noting "the Board's manipulation of the definition of supervisor"); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) (same); *Schnuck Mkts., Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (same); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982) (same); *see also* Todd Nierman, *The RESPECT Act: A Bad Law With A Snappy Acronym Is Still A Bad Law*, Mondaq Bus. Briefing, April 24, 2007 ("Prior to 2006, the [NLRB] had a long history of inconsistently applying th[e] definition [of supervisor]. That inconsistency led several courts of appeals to question the deference to which the NLRB's decisions on this issue were entitled….").

broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair labor practice findings it makes."[26]

Of most significance, though, are the two opinions from the United States Supreme Court – *NLRB v. HCR*[27] and *NLRB v. Kentucky River Comty. Care, Inc.*, ("*Kentucky River*")[28] – which plainly rejected the Board's interpretation of Section 2(11), and implored the NLRB to offer a clear working definition of "supervisor" that was faithful to the text of Section 2(11). In 1994, the Supreme Court issued its opinion in *HCR*, which concerned "the proper interpretation of the statutory phrase 'in the interest of the employer,'" specifically in the context of nursing.[29] The Board had held that a nurse's supervisory activity is not in the interest of the employer if such activity is incidental to the treatment of patients.[30] The Supreme Court summarily rejected the Board's interpretation, stating that it "makes no sense."[31] The Court found that the Board's interpretation of "in the interest of the employer" "created a false dichotomy … between acts taken in connection with patient care and acts taken in the interest of the employer."[32] The Court explained that "[p]atient care is the business of a nursing home, and it follows that attending the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."[33] The Court saw "no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer."[34] That is to say, while many acts performed by supervisors in a health-care setting are for clinical, patient-care reasons, such acts also further the employer's business objective – to provide health-care services. The *HCR* court was clear that "the statutory dichotomy the Board ha[d] created [was] no more justified in the health care field than it would be in any other business where supervisory duties are a necessary incident to the production of goods or the provision of services."[35]

The Court also criticized the Board for effectively – but implausibly – reading out of the Act the portion of Section 2(11) that provides that an individual who uses independent judgment to engage in responsible direction of other employees is a supervisor. In addition, the *HCR* court "did not share the Board's confidence that there is no danger of divided loyalty"[36] when nurses are summarily determined not to be supervisors under the Act. The Court noted:

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26 *Glenmark Assocs.*, 147 F.3d at 340 n.8.

27 511 U.S. 571.

28 532 U.S. 706.

29 511 U.S. at 574.

30 *Id.* at 576.

31 *Id.* at 577.

32 *Id.*

33 *Id.*

34 *Id.* at 577-78.

35 *Id.* at 580.

36 *Id.* at 580-81.

> Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives the nursing home owners the ability to insist on the undivided loyalty of its nurses. . . .[37]

In 2001, the Supreme Court issued its opinion in *Kentucky River*, affirming a decision of the United States Court of Appeals for the Sixth Circuit which held that six registered nurses who assigned and directed other employees were supervisors. The NLRB had held that these nurses' assignments and directions were merely the product of their superior skill and training – not the use of their "independent judgment." In response to the Board's holding, the Supreme Court asked rhetorically, but pointedly, "What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?'"[38] The Court stated that the Board's interpretation of "independent judgment" had "insert[ed] a startling categorical exclusion into statutory text that does not suggest its existence[,]" and that "[t]he breadth of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater 'experience' as well as formal training."[39] Ultimately the Court held that it could not enforce the Board's order based upon its interpretation of independent judgment.[40] In addition, the Court invited the Board to "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as Section 2(11) requires."[41]

IV. THE *KENTUCKY RIVER* TRILOGY OF CASES

Given the sharp criticism the pre-Bush NLRB received from courts and commentators regarding its interpretation of Section 2(11), it was not surprising that the *Kentucky River* Trilogy of cases was a highly anticipated clarification of the Board's jurisprudence. In fact, the NLRB acknowledged the Supreme Court's disagreement with Board precedent on supervisory status and admitted that it "occasionally reached too far" in its attempts to not "construe supervisory status too broadly."[42] Given the importance of the decision, the NLRB "considered the record and briefs of the parties and *amici*, and the Supreme Court's decision in *Kentucky River*," and used the decisions as an opportunity to "refine the analysis to be applied in assessing supervisory status."[43] The Board explained that the "refined analysis honors [the NLRB's] responsibility to protect the rights of those covered by the Act; hews to the language of Section 2(11) and judicial interpretation thereof, most particularly the guidance provided by the Supreme Court in *Kentucky River* and other decisions; and endeavors to provide clear and broadly applicable guidance for

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37 *Id.* at 581.

38 532 U.S. at 715.

39 *Id.* at 714-15.

40 *Id.* at 721.

41 *Id.* at 720 (emphasis in original).

42 *Oakwood*, 348 NLRB No. 37.

43 348 NLRB No. 37.

the Board's regulated community."[44] Specifically, the Board in the *Kentucky River* Trilogy of cases "adopt[ed] definitions for the terms 'assign,' 'responsibly direct,' and 'independent judgment' …."[45]

In *Oakwood Healthcare, Inc.*, the Board, in a 3-2 decision, reversed the decision of the Regional Director and held that certain charge nurses in an acute-care hospital were supervisors where they were responsible for "overseeing the patient care units" and assigning other employees "to participate on their shifts."[46] NLRB Chairman, Robert Battista, and Members Peter Schaumber and Peter Kirsanow voted in the majority; Members Dennis Walsh and Wilma Liebman dissented. The *Oakwood* case arose in the context of an attempt by the United Auto Workers ("UAW") to organize registered nurses ("RNs") at Oakwood Heritage Hospital, in Taylor, Michigan, which employed approximately 180 staff registered nurses. These nurses served as "charge nurses" and were responsible "for overseeing the patient care units," assigning other employees "to patients on their shifts," and various other duties. Twelve RNs served as permanent charge nurses, while 112 RNs rotated at various times into the charge nurse position. The UAW filed a petition seeking a representation election of all RNs working at Oakwood. The Acting Regional Director for NLRB Region 7 issued a Decision and Direction of Election finding that none of Oakwood's charge nurses were supervisors and that all should be included in the voting unit. The employer filed a request for review, which the Board granted in light of *Kentucky River*.

In the *Oakwood* decision, the Board "construe[d] the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee," because "the place, time, and work of an employee are part of his/her terms and conditions of employment." The Board further explained that "assign" refers to an individual's designation of "significant overall tasks [to an employee] … not to the [individual's] ad hoc instructions to perform discrete tasks." A significant overall duty, according to the NLRB, is less than a full "shift assignment" but more than one duty.

The NLRB next addressed the term "responsibly to direct." Agreeing with prior circuit court decisions, the Board held that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." As such, for an employer to meet the "responsibly to direct" test, it must show (1) "that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary," and (2) "that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps."

The NLRB also adopted a definition of independent judgment "[c]onsistent with the Court's *Kentucky River* decision …." Under the refined definition, "independent judgment"

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44 *Id.*

45 *Id.*

46 *Id.*

requires an employee to "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." That is, where "detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement" dictate the outcome of the "judgment," it is not independent under the Act. Thus, the Board left open the door for narrowing the Section 2(11) definition by application of employer policy and procedure, legislation, or collective bargaining negotiations. Finally, the NLRB stressed that an individual must spend "a regular and substantial portion of his/her time performing supervisory functions" in order to be considered a supervisor under the Act. Although the Board has not adopted a strict numerical definition of "substantial," supervisory status has been found "where the individuals have served in a supervisory role for at least 10-15 percent of their total work time."

Applying these definitions to the facts at hand, the NLRB found that only the twelve permanent charge nurses qualified as supervisors under the Board's newly refined analysis. The NLRB noted that the employer offered no evidence that the charge nurses are required to take corrective action if other employees failed to follow their instructions, nor any evidence that the charge nurses were subject to lower evaluations or discipline as a result of their direction.

The Board did find, however, that the "charge nurses' assignments determine what will be the required work for an employee during the shift, thereby having a material impact on the employee's terms and conditions of employment." "Having found that the charge nurses hold the authority to [assign tasks, the] next step [was] to determine whether the charge nurses exercise[d] independent judgment in making the[] assignments." The Board found that only some of the charge nurses exercised independent judgment. Charge nurses on patient-care units "exercised the requisite discretion to make [an] assignment a supervisory function 'requiring the use of independent judgment'" because they made "assignment[s] based upon the skill experience, and temperament of other nursing personnel and on the acuity of the patients …." By contrast, charge nurses in the emergency department did not exercise independent judgment because they simply announced a rotating schedule when making assignments. **In its final analysis, the Board found that only the twelve permanent charge nurses were supervisors under the Act; the 112 nonpermanent or 'rotating' charge nurses did not act in supervisory roles with the requisite regularity to satisfy the Act.**

In *Golden Crest Healthcare Ctr.*,[47] the Board held, in a 3-0 decision, that charge nurses at a nursing home were not supervisors. The dispute arose out of an effort by the United Steelworkers to organize RNs and licensed practical nurses ("LPNs") employed by Golden Crest at an eighty-bed nursing home in Hibbing, Minnesota. Golden Crest employed eight RNs who worked as charge nurses, twelve LPNs, eleven of whom occasionally worked as charge nurses, thirty-six certified nursing assistants ("CNAs"), and five stipulated supervisors. Golden Crest contested the petitioned-for bargaining units, arguing that its RNs and LPNs acting as charge nurses were supervisors under the Act. The Regional Director in NLRB Region 18 issued a Decision and Direction of Election in March 1999, finding that charge nurses at Golden Crest were not supervisors under the NLRA. After much litigation on the issue, the NLRB granted the employer's request for review.

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[47] 348 NLRB No. 39.

In *Golden Crest*, the employer argued that its charge nurses "assigned" employees by ordering them to go home early, assigning them to different locations based on staffing needs, and mandating that employees come in to work from home or leave work early. According to the NLRB, however, these nurses did not have the authority to "require" that any action be taken; they merely made requests, failing to satisfy the definition of "assigning" announced in *Oakwood*. In addition, the NLRB held that the nurses did not "responsibly direct" because they would not experience any "material consequences" from the performance of their directing duties. Although the employer presented evidence that nurses were rated differently on their ability to direct, the Board held that the employer did not meet its burden: "[T]he mere fact that charge nurses were rated on this factor does not establish that any adverse consequences could or would befall the charge nurses as a result of the rating." The Board was looking for evidence that actual "action, either positive or negative, has been or might be taken as a result of the charge nurses' evaluation on this factor." Indeed, the burden of proof alone required under *Golden Crest* could limit the number of individuals who could otherwise be considered supervisors under Section 2(11) in future cases.

In the third opinion in the *Kentucky River* Trilogy, *Croft Metals, Inc.*,[48] the NLRB held that lead persons in an aluminum and vinyl window and door manufacturing facility were not supervisors under the Act. The dispute in *Croft Metals* arose in the context of a representation petition filed by the International Brotherhood of Boilermakers seeking to represent production and maintenance employees at Croft Metal's manufacturing facility in McComb, Mississippi. Croft Metals employed approximately 350 production and maintenance employees, about 15 statutory supervisors, and between 25 and 35 lead persons. These lead persons spent a "great deal" of their time engaging in the type of hands-on work performed by the undisputed unit employees. Lead persons were paid by the hour, while supervisors received a salary. Lead persons generally enjoyed benefits comparable to those of hourly potential bargaining-unit employees, as opposed to supervisors. Croft Metals argued that the lead persons were supervisors and should be excluded from the bargaining unit. The Acting Regional Director in NLRB Region 15 issued an opinion finding that the lead persons were not supervisors under the NLRA, and the Board granted review of the finding.

The NLRB first found that the "[l]ead persons do not assign employees to production lines or departments or to shifts or overtime periods … [or] to their job classifications … The employees allocated to the lead persons generally perform, consistent with their classification, the same tasks or job on the line or in their department every day … Occasionally, a lead person may switch tasks among employees on his line or in his crew during the shift … the lead persons may direct the employees as necessary to ensure that the projects are completed on a timely basis." According to the NLRB, this "sporadic rotation of different tasks by the lead persons more closely resembled an 'ad hoc instruction that an employee perform a discrete task' during the shift" rather than an assignment.

The Board did hold, however, that the lead persons did "responsibly direct" because "the lead persons direct individuals when they decide 'what job shall be undertaken next and who shall do it.'" In addition, there was a "specific showing of 'some adverse consequence befalling

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[48] 348 NLRB No. 38.

the lead persons providing the oversight if the tasks performed [were] not performed properly….'" In the final analysis, the Board concluded that the lead persons were not supervisors because they did not exercise "independent judgment." The NLRB found that any discretion exercised was "routine or clerical," and most decisions were dictated by pre-established work rules. The holding in *Croft Metals* is consistent with prior Board precedent, which has generally held that "lead persons" do not qualify as "supervisors" under the Act.

V. THE "SO CALLED TENSION" BETWEEN SECTIONS 2(11) AND 2(12) OF THE NLRA

In the past, the Board has attempted to defend non-textually based limitations to Section 2(11) as a means to relieve the purported tension between Section 2(11)'s exclusion of "supervisors" from the Act's coverage and Section 2(12)'s inclusion of "professional" employees. *See, e.g.*, *Id.* at 719-20. In reality, however, the alleged conflict between the two sections has been greatly overstated. Furthermore, (1) to the extent that any such conflict exists, it does not and cannot justify interpretations of Section 2(11) that distort the plain and ordinary language of that Section; and (2) such "distinctions" do not support a case for enactment of H.R. 1644.

As former NLRB Member Charles Cohen pointed out in his dissent in *Providence Hosp.*, 320 NLRB 717 (1996), the application of basic principles of statutory construction—such as the maxim that "each . . . section of the Act is to be given effect" and that "the Act is to be construed so as to avoid conflicts between the sections thereof"—reveals that there is no true conflict between Section 2(11) and Section 2(12). 320 N.L.R.B. at 736 (Cohen dissenting). As Member Cohen noted, it is, of course, true that professional employees are covered by the Act and supervisors are not. It is also true that some of the language in Section 2(11) is roughly paralleled in Section 2(12). Section 2(11) defines a supervisor, in part, as one who uses "independent judgment" in the execution of one or more enumerated activities. Section 2(12) defines a professional employee, in part, as one who uses "discretion and judgment" in the exercise of his or her duties. Nevertheless, the distinction between Section 2(11) and Section 2(12) is "substantial and real." *Id.* at 737.

> The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs. A professional exercises discretion and judgment with respect to tasks that he or she performs.

Id. (emphasis added); *see also Attleboro Assocs.*, 176 F.3d at 168 ("There is an obvious distinction between exercising independent judgment or acquired skill in completing a task, on the one hand, and using independent judgment in performing one of the 12 section 2(11) tasks, on the other hand.").

Member Cohen then went on to illustrate the distinction between an employee's use of judgment in the execution of a professional task assigned to the employee, and the use of judgment in supervision of other employees. He did so in the context of the nursing and in the context of directions given to other employees.

> Thus, for example, the task of devising a patient treatment plan involves the use of professional judgment. The nurse who devises that plan is a professional employee. But, the nurse who then administers the plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse must decide which of the various tasks (outlined in the plan) must be done first, and the nurse must select someone to perform that task. In the words of Senator Flanders [the author of the Act's "responsibly to direct" language] the nurse must decide "what job will be undertaken next and who shall do it." In addition, the nurse must take steps to assure that the task is performed correctly. In the words of Senator Flanders, the nurse gives "instructions for its proper performance, and training in the performance of unfamiliar tasks."

Id. The Second Circuit has illustrated the distinction similarly:

> It may be the case that one who makes a judgment about the need for certain actions based on specialized knowledge and experience and exercises no further authority is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor. For example, if one's responsibility for a particular patient is exhausted by indicating on a form a treatment program, the actual treatment being the entire responsibility of others, it may be that one is not a supervisor. However, where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised.

Schnurmacher, 214 F.3d at 268 (emphasis added). In short, then, when a professional employee exercises judgment in the execution of one of Section 2(11)'s listed functions—including the giving of directions to others—that employee is properly classified as a supervisor.

Such analysis[49] does not create "tension" between Section 2(11) and 2(12), but rather gives effect to the plain meaning of both provisions. In all events, even assuming *arguendo* that some tension did exist, the Supreme Court has repeatedly made clear that the Board may not "distort[] the statutory language" of Section 2(11) to resolve it. *Kentucky River*, 532 U.S. at 720 (quoting *HCR*, 511 U.S. at 581 (quoting *NLRB v. Yashiva Univ*., 444 U.S. 672, 686 (1980))). Plainly, "[t]he Act does not distinguish professional employees from other employees for the purposes of the definition of supervisor in Section 2(11)." *HCR*, 511 U.S. at 581; *see also Attelboro Assocs*., 176 F.3d at 168 ("Consequently, it is impossible to comprehend how a nurse's status as a professional employee negates her status as a supervisor."). As such, the Board and the courts may not avoid a straightforward and textually honest application of Section 2(11) in nurse-supervisor cases, or other cases involving professional employees, simply because it

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[49] To be clear, in acknowledging the textually driven distinction between the exercise of judgment for the purposes of Section 2(11) and for the purpose of Section 2(12), we do not endorse the idea that there is a distinction between "directing the manner of others' performance of discrete tasks" and the direction of "other employees." Such a distinction is not supported by the text of Section 2(11). To the contrary, it would gut the very purpose for which the term "responsibly to direct" was added to the Act. *See, e.g.*, 93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders) (describing a supervisor who gives responsible direction as one who "gives instruction for proper performance" and "training in the performance of unfamiliar tasks to the worker to whom they are assigned") (emphasis added).

dislikes the results. *See Providence Hosp.*, 320 NLRB at 726 (acknowledging this Court's command that "Section 2(11) must drive Board policy, not the other way around").

VI. ORGANIZED LABOR'S REACTION TO THE *KENTUCKY RIVER* TRILOGY OF CASES

Organized labor has been highly critical of these opinions,[50] claiming that the *Kentucky River* Trilogy "welcomes employers to strip millions of workers of their right to have a union by reclassifying them as 'supervisors' – in name only."[51] Certain union-oriented publications rely upon the sensationalist article, *Supervisor in Name Only; Union Rights of eight million workers at stake in Labor Board ruling,* published by EPI more than two months *before* the Board issued the opinions. Despite the fact that the Board had yet to rule, and EPI did not know how the NLRB would ultimately refine the definition of supervisor, it none-the-less alleged that the *Kentucky River* Trilogy of cases would take away the right to unionize from 8 million Americans.[52] EPI also published a "State-by-State Analysis" of the *potential* impact of the Board's then-upcoming decision.[53] Upon a careful review of these critiques, however, it becomes apparent that EPI's analysis is without any factual basis and without any scholarly or academic value.

As an initial matter, in the very cases that EPI predicted would strip away the rights of millions to unionize, less than 7% of the employees at issue were found to be supervisors.[54] In fact, *Oakwood* was the only one of the three decisions to find that any of the disputed employees were supervisors, and in that instance, only twelve out of 124 nurses were held to be supervisors.[55] The NLRB held that none of the nineteen nurses in *Golden Crest* were supervisors under the Act,[56] and neither were the lead persons in *Croft Metals*.[57] Moreover, the unions ultimately won the certification elections at the facilities at issue in both *Golden Crest* and *Croft*

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[50] *See, e.g.,* James Parks, *Working Families Take Action on Anti-Worker Labor Board Ruling*, Oct. 4, 2006 (http://blog.aflcio.org/2006/10/04/working-families-take-action-on-anti-worker-labor-board-ruling); Nathan Newman, *Major Destruction of Workers Rights at NLRB Today*, Oct. 3, 2006 (http://www.tpmcafe.com/blog/coffeehouse/2006/oct/03/major_destruction_of_workers_rights_at_nlrb_today).

[51] *AFL-CIO President Sweeney On Today's Bush Labor Board Decision That Will Strip Workers of Union Rights*, Oct. 3, 2006 (http://www.aflcio.org/mediacenter/prsptm/pr10032006.cfm?RenderForPrint=1).

[52] Economic Policy Institute Issue Brief #225.

[53] Economic Policy Institute Policy Memorandum #115, *The Potential Impact of NLRB's Supervisor Cases, A State-by-State Analysis*, September 5, 2006 (http://www.epi.org/printer.cfm?id=2477&content_type=1&nice_name=pm115).

[54] The total number of employees involved in the *Kentucky River* Trilogy was somewhere between 168 and 178 (124 in *Oakwood*; 19 in *Golden Crest*; 25-35 in *Croft Metals*), and only 12 were found to be supervisors.

[55] 348 NLRB No. 37.

[56] The employer in *Golden Crest* employed 8 RNs who work as charge nurses and 12 LPNs, 11 of whom work at least occasionally as charge nurses, for a total of 19 charge nurses who could have potentially been supervisors. 348 NLRB No. 39.

[57] The employer had "roughly 25-35 lead persons …." 348 NLRB No. 38.

Metals. Since, the NLRB issued the *Kentucky River* Trilogy of cases, there do not appear to have been any published opinions regarding bargaining unit clarification issued by the Board that rely upon the *Kentucky River* Trilogy of cases. EPI's claim that 8 million workers would be reclassified as supervisors a result of the *Kentucky River* Trilogy of cases simply does not comport with the reality of the results and is yet another example of extreme sensationalism and highly inaccurate "findings" by this organization.[58]

Moreover, the majority in *Oakwood* specifically addressed the dissent's similar concern that the decision "threaten[ed] to sweep almost all staff nurses outside of the Act's protection."[59] Rejecting the argument that there would be a "sea change in the law," the majority was clear that it would not "start with an objective – for example, keep all staff nurses within the Act's protection – and fashion[] definitions from there to meet that targeted objective …." The majority, apparently skeptical of the doomsday predictions, explained that the Board does "not prejudge what the result in any given case will be. [It] shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11)." Moreover, the majority's approach was in line with prior judicial criticism on the Board's tendency to interpret Section 2(11) "in a unique manner" in the nursing context.[60]

Further, EPI's methodology was patently flawed. EPI's analysis relies on a definition of "supervisor" that is not based upon the definition of supervisor found in the NLRA. Instead, EPI used the Bureau of Labor Statistics' estimates of the share of supervisory duties possessed by the occupations assessed in the Bureau of Labor Statistics' National Compensation Survey ("NCS").[61] This "share" of supervisory duties is one of ten factors (*e.g.*, knowledge, complexity, personal contacts, etc.) used in the NCS, each of which is categorized at various levels. EPI identified those occupations at NCS' level 2 of supervisory duties as those that would be stripped of their right to unionize. Specifically, for purposes of its statistics, EPI considered employees supervisors where the "[i]ncumbent sets the pace of work for the group and shows other workers in the group how to perform assigned tasks. Commonly performs the same work as the group, in addition to lead duties. Can also be called group leader, team leader, or lead worker."[62] It is readily apparent that none of the twelve statutory indicia of a supervisor under Section 2(11) – authority to (1) hire; (2) transfer; (3) suspend; (4) lay off; (5) recall; (6) promote; (7) discharge; (8) assign; (9) reward; (10) discipline; (11) responsibly direct; or (12) adjust grievances – are

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58 *See, e.g.*, Ross Eisenbrey, *Millions to Lose Overtime Pay*, The Montana Standard, August 17, 2004 (http://www.epi.org/content.cfm/webfeatures_viewpoints_OT_pay_loss), Ross Eisenbrey, *Longer Hours, Less Pay, Labor Department's new rules could strip overtime protection from millions of workers*, Briefing Paper #152, July 2004 (http://www.epi.org/content.cfm/briefingpapers_bp152); Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay, Department of Labor proposal means lower pay, longer hours for millions of workers*, Briefing Paper #139, June 26, 2003 (http://www.epi.org/content.cfm/briefingpapers_flsa_jun03); and other articles published by EPI regarding the Department of Labor's proposed changes to the Fair Labor Standards Act regarding overtime pay available at http://www.epi.org.

59 348 NLRB No. 37.

60 *HCR*, 511 U.S. at 574; *see also Kentucky River*, 532 U.S. 706.

61 Economic Policy Institute Issue Brief #225.

62 Economic Policy Institute Issue Brief #225.

present in this definition. EPI's statistics, therefore, hold little, if any weight, given that they rely upon a definition of supervisor wholly unrelated to Section 2(11). Further, if EPI's description of a "supervisor" is any way related to the decisions found in the *Kentucky River* Trilogy of cases, it could only be with the definition of a "lead person." For example, in *Croft Metals*, the lead persons spent a large amount of their time performing the same work as the putative bargaining-unit employees, although they occasionally performed lead duties, such as switching tasks among employees and sometimes directing employees as necessary to complete a project. Under prior NLRB precedent, such "lead person" was generally not considered to be a "supervisor," and the *Kentucky River* Trilogy of cases did not stray from this precedent. Indeed, the lead persons in *Croft Metals* were held not to be supervisors because their purported authority to assign more closely resembled an "ad hoc instruction that an employee perform a discrete task." Clearly, the definition of supervisor relied upon by EPI in its statistics would not be considered a supervisor under the *Kentucky River* Trilogy of cases or prior Board precedent. By using a definition of what constitutes a supervisor that is wholly unrelated to Section 2(11) and related jurisprudence, EPI has inflated the number of affected employees and distorted the overall impact of the Board's decisions. Again, one only need look to the actual results of the *Kentucky River* Trilogy of cases to realize the extent of EPI's exaggeration.

VII. THE H.R. 1644 AMENDMENTS

To properly analyze the proposed amendments contained in H.R. 1644, one first needs to review Section 2(11) in its entirety. Section 2(11) states:

> The term "supervisor"' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[63]

There is unanimity that only one of the twelve statutory indicia of supervisory status needs to be present in order for an employee to be a supervisor under Section 2(11).[64] The inquiry, however, does not end there. The very text of Section 2(11) sets forth a three-part test for determining supervisory status: "Employees are statutory supervisors if[:]

(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions[;]

(2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment[;]' and

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[63] 29 U.S.C. 152(11).

[64] *See Kentucky River*, 532 U.S. at 713; *Oakwood*, 348 NLRB No. 37.

(3) their authority is held 'in the interest of the employer.'"[65]

In addition, the individual must "spend[] a regular and substantial portion of his/her work time performing supervisory functions."[66] Under this test, "'regular' means according to a pattern or schedule as opposed to sporadic substitution."[67] The NLRB has not adopted a strict, numerical, definition of "substantial," but has found that at least 10-15% of the individual's work time will suffice.[68] Finally, although the NLRA "does not … expressly allocate the burden of proving or disproving a challenged employee's supervisory status … [t]he Board … has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor[,]" a rule that has been accepted by the Supreme Court.[69] Thus, it is clear that there are safeguards within the statute to exclude from the definition of supervisor those who only engage in one of the twelve criterion without any of the other trappings of a statutory supervisor. The Board's decision in *Croft Metals* is a good example of these safeguards in action, where the lead persons had authority to and did responsibly direct other employees to perform certain tasks, but did so in a routine or clerical nature because their decisions were dictated by the employer's pre-established work rules. What is clear from the existing analysis of supervisory status is that the process is reasoned and informed, and, as discussed more fully below, does not easily lead to a finding of supervisory status. This thorough analysis helps to maintain the proper balance between management and labor.

The proposed amendments included in the RESPECT Act – striking "assign" and "responsibility to direct" [Section 2(11) contains the phrase "responsibly to direct" and apparently, H.R. 1644 contains a drafting error on this point] – are clearly targeted at the Board's recent clarification of Section 2(11) found in the *Kentucky River* Trilogy of cases and are without doubt founded in part upon EPI's incorrect doomsday predictions that millions of employees would be stripped of their right to unionize. Interestingly, it should be noted that the H.R. 1644 amendments would have had little impact on the decisions in the *Kentucky River* Trilogy of cases – if at all. Such amendments arguably would only have changed the status of the 12 employees who were actually found to be supervisors out of somewhere between 168 and 178 total employees in all three cases. Indeed, the twelve nurses in *Oakwood* who were found to be supervisors because they spent a *regular and substantial* amount of their time exercising their authority to "assign" through the use of their *independent judgment*. Additionally, the majority's interpretation of "assign" is not as all-encompassing as some would claim, and in fact conforms to the guidance provided by the Supreme Court as well as the text and legislative history of the statute. The NLRB was clear that it did not interpret assign to encompass an "ad hoc instruction that the employee perform a discrete task," but rather the "designation of significant overall duties." Additionally, as discussed above, Congress intentionally included the criterion "responsibly to direct" after consideration of the Board's prior definition of supervisor under

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65 *Kentucky River,* 532 U.S. at 713 (citing *HCR*, 511 U.S. at 573-74).

66 *Oakwood*, 348 NLRB No. 37 (citing *Brown & Root, Inc.*, 314 NLRB No. 19, 21 (1994); *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992); and *Alladin Hotel*, 270 NLRB 838 (1984)).

67 *Id.*

68 *Id.*

69 *Kentucky River*, 532 U.S. at 710-11.

which such activity alone would not qualify an employee as a supervisor. Furthermore, the *Kentucky River* Trilogy of cases did not create any categorical exclusions, or inclusions, to the definition of a supervisor under Section 2(11). Rather, as the majority in *Oakwood* explained, the NLRB "shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11)."

With respect to the addition of "and for a majority of the individual's worktime" after "interest of the employer," this amendment is an unnecessary addition to the statute. First, as the NLRB pointed out in the *Oakwood* decision, when an employee engages in a supervisory role only part of the time, such time must be both a "regular and substantial portion of his/her work time" for the employee to be considered a statutory supervisor. Notably, the 112 rotating charge nurses in *Oakwood* were not found to be supervisors because there was no "showing of regularity for assigning the 'rotating' charge nurses," thus the Board did "not decide whether these RNs possess the 'rotating' charge nurse duties for a 'substantial' part of their work time."[70] To be sure, an employee can be a statutory supervisor if he or she engages in supervisory activities less than fifty percent of the time, but occasional or isolated instances of supervisory functions surely do not qualify. As one commentator has pointed out, the NLRB takes a qualitative and not quantitative approach.[71] The addition of "for a majority of the individual's worktime" would only add an arbitrary temporal criterion to the statute.

Furthermore, our survey of NLRB and federal court litigation involving Section 2(11) from 1995 to present, indicates that in many instances the Board and the courts have not found individuals to be supervisors under Section 2(11) of the Act. (*See* Appendix 1, Appendix 2) In half of the federal court cases, the employees at issue were not found to be supervisors, and in the instances in which the court did find them to be supervisors, the finding was generally based on grounds other than, or in addition to, their authority to "assign" or "responsibly to direct." (*See* Appendix 1) The decisions by the NLRB since 1995 are quite similar. (*See* Appendix 2) The majority of the NLRB decisions found that the employees at issue were not supervisors, and in the majority of those cases where the employees were held to be statutory supervisors, such determination was based on criteria other than, or in addition to, authority to "assign" or "responsibly to direct."

Additionally, one can reach the conclusion that decisions of the NLRB prior to the present Bush Board inconsistently interpreted Section 2(11), by failing to properly apply the requirements of Section 2(11). The decisions of the United States Supreme Court in *Kentucky River* and *HCR*, discussed above, would appear to clearly validate such conclusion. Further, analyses of Board decisions prior to 1995 also reached the conclusion that the Board was not only incorrect in their analysis and application of Section 2(11), but did so in a result oriented fashion. For example, in the article "The NLRB and Supervisory Status: An Explanation of Consistent Results" the author concluded that in many Board cases "borderline individuals were found to be supervisors when that determination had the effect of attributing liability to an

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[70] The Board had noted that a substantial portion must be at least 10-15 percent of the employee's total work time. *Oakwood*, 348 NLRB No. 37.

[71] *See*, Todd Nierman, *The RESPECT Act: A Bad Law With A Snappy Acronym Is Still A Bad Law*, Mondaq Bus. Briefing, April 24, 2007.

employer for an individual's actions. . . . In contrast, borderline individuals were found to be employees when that determination protects them from an employer's sanction.[72]"

Mr. Chairman and Members of the Subcommittee, one thing I believe that all interested stakeholders to this discussion can agree, whether they be members of the Board, the federal judiciary, employer or union representatives, that it is important for there to be clarity and predictability in the application of Section 2(11) of the NLRA. Such clarity and predictability is indeed important for stability in labor relations in this country. All stakeholders should think carefully, however, before pursuing any changes, not only to the NLRA generally, but particularly, to Section 2(11) of the Act. As noted above there are many important public policy and statutory considerations that went into the drafting of this Section of the NLRA. While it is not perfect in its statutory construction – like many of our statutes – it does represent a carefully crafted equilibrium between the interest of management and labor. If this Subcommittee intends to pursue a dialogue in this area, much greater consideration should be given to this topic.

Mr. Chairman, and Members of the Subcommittee, thank you for permitting me to share my views with you this afternoon. I would be happy to answer any questions that you may have.

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[72] Note, the NLRB and supervisory status: "an explanation of inconsistent results", 94 Hrv.L.Rev. 1713, 1713-27 (1981).

APPENDIX 1

**Survey of U.S. District Court of Appeals Decisions Since 1995
In Which the Definition of Supervisor Under Section 2(11)
Was a Component of the Court's Holding**

Case	2(11) Aspect of Case
Jochims v. NLRB, No 05-1455, 2007 U.S. App. LEXIS 6756 (D.C. Cir. March 23, 2007)	Charge nurse did not possess the ability to "discipline" under Section 2(11) where she merely had the ability to issue written reprimands. Also, charge nurse did not exercise "independent judgment" in (i) sending two employees home after gross misconduct, and (ii) completing another employees evaluation because management instructed her to undertake both tasks.
NLRB v. St. Clair Die Casting, L.L.C., 423 F.3d 843 (8th Cir. 2005)	Set-up specialists were not supervisors under the Act where set-up specialists did not exercise independent judgment in disciplining other employees or in assigning tasks and did not recommend personnel action in their evaluations.
NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478 (2003) (6th Cir. 2003)	Leads were not supervisors where the leads did not possess any of the supervisory indicia under Section 2(11). Court specifically found that the leads did not assign or responsibly direct.
Public Serv. Co. of Col. v. NLRB, 271 F.3d 1213 (10th Cir. 2001)	Overturned Board's ruling based on Board's misinterpretation of the term "independent judgment."
Integrated Health Servs. of Mich., at Riverbend, Inc. v. NLRB, 191 F.3d 703 (6th Cir. 1999)	The Court, in a blistering opinion, overturned the Board's ruling and held that staff nurses were supervisors because the nurses scheduled, assigned, disciplined and directed.
NLRB v. Hilliard Dev. Corp., 187 F.3d 133 (1st Cir. 1999)	Charge nurses were not supervisors where they didn't act with independent judgment.
Cooper/ T. Smith, Inc. v. NLRB, 177 F.3d 1259 (11th Cir. 1999)	Docking pilots were not supervisors under the Act because they did not exercise independent judgment in assigning and responsibly directing other employees.
NLRB v. Attleboro Assoc. Ltd., 176 F.3d 154 (3rd Cir. 1999)	Court found that charge nurses were supervisors under the Act because they exercised independent judgment in administering discipline, adjusting grievances, and assigning.

Case	2(11) Aspect of Case
NLRB v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999)	Licensed practical nurses ("LPN's") were not supervisors because they did not exercise independent judgment in their assignment, scheduling, and disciplining functions.
Beverly Enters. v. NLRB, 166 F.3d 307 (4th Cir. 1999)	LPN's were supervisors under the act because they exercised at least some independent judgment in assigning and disciplining for "almost one-half of their working hours."
Beverly Enters. v. NLRB, 165 F.3d 290 (4th Cir. 1999)	LPN's were supervisors because they acted on behalf of the employer, and exercised independent judgment in assigning, directing, and disciplining. LPN's were the most senior staff working almost two-thirds of the time they worked.
Beverly Enters. v. NLRB, 148 F.3d 1042 (4th Cir. 1998)	The LPNs were not supervisors because they did not exercise any of the supervisory indicia with independent judgment.
Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333 (4th Cir. 1998)	The LPN's who spent over two-thirds of their working time as the highest ranking employee and exercised independent judgment in assigning and disciplining.
Edgewood Nursing Ctr., Inc. v. NLRB, No.'s 96-6236, 96-6322, 1998 U.S. App. LEXIS 3151 (Feb. 24, 1998)	Court held that charge nurses were supervisors under the Act because they exercised independent judgment in responsibly directing other employees.
Grancare, Inc. v. NLRB, 137 F.3d 372 (1998)	Court held that charge nurses exercised independent judgment in assigning, responsibly directing, and disciplining.
Providence Alaska Med.l Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997)	Court found that charge nurses did not exercise independent judgment in carrying out any supervisory function.

APPENDIX 2

Survey of NLRB Decisions Since 1995
In Which the Definition of Supervisor Under Section 2(11)
Was a Component of the Board's Holding

Case	Section 2(11) Aspect of Case
Croft Metals, Inc., 348 NLRB No. 38 (2006)	The Board held that lead persons in a manufacturing facility were not statutory supervisors. The lead persons did not "assign" because they did not have "authority to require" other employees to undertake the actions in question. The lead persons did, however, manage their assigned team, correct inadequate performance, and move employees to different tasks. Still, the lead persons were not supervisors under the Act.
Golden Crest Healthcare Ctr., 348 NLRB No. 39 (2006)	The Board held that the charge nurses lacked the supervisory authority to assign and responsibly direct other employees. The charge nurses lacked the authority to send certified nursing assistants ("CNAs") home early, to reassign CNAs to other tasks, or to require CNAs to stay late. The Board determined that the employees at issue did not meet the supervisory requirements of Section 2(11).
Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006)	Charge nurses were responsible for "overseeing the patient care units" and assigning other employees to patients during the shift. The Board held that twelve charge nurses met the definition of a supervisor under the Act. However, the Board also held that 112 other charge nurses, including rotating charge nurses, did not have sufficient authority, duties, discretion, and accountability to meet the definition of a supervisor. The Board concluded that the employer failed to demonstrate that the charge nurses "were accountable for the performance of the task" and, thus, did not responsibly direct under the Act. However, the duties of the charge nurses did meet the statutory definition of "assign" because they regularly assigned nursing personnel to specific patients during the shift.
J.C. Penney Corp., Inc., 347 NLRB No. 11 (2006)	The Board held that a training supervisor did not meet the supervisory status requirements of Section 2(11). The training supervisor lacked hiring decision authority and simply steered applicants through the system.

Case	Section 2(11) Aspect of Case
Dynasteel Corp., 346 NLRB No. 12 (2005)	A maintenance department fitter and welder was not a supervisor under the Act because none of the primary supervisory indicia under Section 2 (11) were established. Board held that the signing of disciplinary warnings against other employees did not show supervisory status. Further, the Board held that the fitter and welder did not have authority to hire, fire, transfer, or discipline employees.
Mountaineer Park, Inc., 343 NLRB No. 135 (2004)	The Board held that "assistant supervisors" in the housekeeping department were supervisors within the meaning of Section 2 (11). The Board held that the assistant supervisors had authority to "effectively recommend" discipline and also possessed secondary indicia of supervisory authority (they earned a higher wage and wore the same uniforms as stipulated statutory supervisors.)
Volair Contractors, Inc., 341 NLRB No. 98 (2004)	The Board held that the employer failed to show that a pipe fitter/welder was a supervisor by virtue of either his assignment of work to and direction of his crewmembers, or alleged disciplinary authority, because the employer failed to show that the pipe fitter/welder exercised authority using independent judgment, as required by Section 2 (11).
Arlington Masonry Supply, Inc., 339 NLRB No. 99 (2003)	The Board held that a "maintenance supervisor" was statutory supervisor under Section 2 (11). The "maintenance supervisor" prioritized work needs, made assignments, exercised discretion, created schedules, and granted time off.
Dean & DeLuca New York, Inc., 338 NLRB No. 159 (2003)	The Board held that a buyer was not a statutory supervisor, even though the individual periodically held management meetings, was in charge of the store on Saturdays and may have filled out personnel reviews. The Board also held that the manager of a maintenance department was not a statutory supervisor, even though he made schedules, closed the store at nights, and allegedly had firing authority. The activities of the employees did not establish supervisory status under Section 2 (11).

Case	Section 2(11) Aspect of Case
Los Angeles Water and Power Employees' Assoc., 340 NLRB No. 146 (2003)	The Board held that an employer failed to establish that an "accountant" was a supervisor under Section 2 (11). The Board found no merit in the employer's contention that the accountant acted for the office manager when he was out, and had the authority to assign employees and recommend the hiring and disciplining of employees.
Progressive Transp. Servs., Inc., 340 NLRB No. 126 (2003)	The Board held that a "deck lead supervisor" was a supervisor within the meaning of Section 2 (11) of the Act. The Board held that the "deck lead supervisor" had authority to effectively recommend discipline and possessed several secondary indicia of supervisory authority.
Visiting Nurses of Health Midwest, 338 NLRB No. 113 (2003)	The Board held that the employer failed to establish that a clinical coordinator was a supervisor under the Act. The employer contended that the clinical coordinator was a supervisor because she assigned patients needing IV therapy to line employees.
American Commercial Barge Line Co., 337 NLRB No. 168 (2002)	The Board held that pilots were supervisors under the Act because they had authority to direct the towboat crew in their work and to assign work.
Heritage Hall, E.P.I. Corp., 333 NLRB No. 63 (2001)	The Board held that LPNs were not statutory supervisors. The employer's contention that the LPN job description which included language about supervising nursing assistants was not dispositive of their status. Further, the record did not establish that the LPNs' assignment authority over the nursing assistants was anything more than routine in nature.
Ken-Crest Servs., 335 NLRB No. 63 (2001)	The Board held that the program managers were not supervisors within the meaning of Section 2 (11) of the Act. The Board found that the program managers did not actually resolve minor grievances. Further, the Board found that their limited authority to resolve minor disputes is insufficient to establish supervisory authority.

Case	Section 2(11) Aspect of Case
Michigan Masonic Home, 332 NLRB No. 150 (2000)	The Board held that the LPNs were not supervisors within the meaning of Section 2 (11) of the Act. The Board found that the employer had not met its burden of establishing that the LPNs performed a supervisory function in disciplining employees.
Training School at Vineland, 332 NLRB No. 152 (2000)	The Board held that group home managers were not supervisors within the meaning of Section 2 (11) of the Act. The employer contended that the group home managers assigned, directed, effectively recommended hiring, effectively recommended discipline, and evaluated direct care workers. The Board found that the employer did not establish that the group home managers possessed any of the claimed statutory supervisory authority as their responsibilities did not evidence the requisite independent judgment.
Acme Markets, Inc., 328 NLRB No. 173 (1999)	The Board affirmed the Regional Director's decision that pharmacy managers are not statutory supervisors as defined in Section 2 (11) of the Act. There was no record evidence that the pharmacy managers possessed supervisory authority and in the limited instances where pharmacy managers were involved in employee discipline, their involvement was insufficient to demonstrate effective recommendation of discipline.
Crittenton Hospital, 328 NLRB No. 120 (1999)	The Board held that the nurses did not possess any of the indicia of supervisory status under Section 2 (11). The nurses' participation in the evaluations process did not demonstrate a link between the evaluation and an effect on employee job status.
Elmhurst Extended Care Facilities, Inc., 329 NLRB No. 55 (1999)	The Board held that the charge nurses were not Section 2 (11) supervisors. The employer did not show that the nurses' completion of annual evaluations lead directly to personnel actions that affected the wage or job status of nursing assistants.

Case	Section 2(11) Aspect of Case
Heartland of Beckley, 328 NLRB No. 156 (1999)	The Board found that the licensed nurse practitioners possessed Section 2 (11) supervisory authority. The Board found that the nurses had the authority to discipline within the employer's progressive disciplinary system.
Macy's West, Inc., 327 NLRB No. 201 (1999)	The Board found that a chief engineer was not a statutory supervisor within the meaning of Section 2 (11). The record failed to establish that the chief engineer's role, based on his technical expertise, in assigning and directing maintenance engineers, involved the use of independent judgment required under Section 2 (11).
Masterform Tool Co., 327 NLRB No. 185 (1999)	The Board found that leadmen were not supervisors under Section 2 (11). The Board found that the leadmen's assignment and direction of employees involved typical routine decisions without any exercise of independent judgment.
McGraw-Hill Broad. Co., 329 NLRB No. 48 (1999)	The Board found that producer/directors were not statutory supervisors under the Act. The Board found that where individuals are a part of an integrated team in which their skills and responsibilities are collaborative to develop a single product, there is not a showing of Section 2 (11) supervisory status. Further, the Board found that the producer/directors did not exercise independent judgment in assigning employees; also, their authority to give directions to the employees working with them was not supervisory authority.
Pepsi-Cola Co., 327 NLRB No. 183 (1999)	The Board found that all account representatives who have merchandisers assigned to them are supervisors as defined by Section 2 (11). The Board found that the account representatives were statutory supervisors based on their authority to discharge the merchandisers assigned to them.

Case	Section 2(11) Aspect of Case
Vencor Hospital – Los Angeles, 328 NLRB No. 167 (1999)	The Board held that the RN team leaders did not possess any supervisory indicia within the meaning of Section 2 (11) of the Act. The Board held the RN team leaders did not assign or independently direct employees, did not discipline or effectively recommend disciplinary action, and did not use independent judgment in completing employee evaluations.
Custom Mattress Mfg., Inc., 327 NLRB No. 30 (1998)	The Board found that an employee in the sewing department was not a Section 2 (11) supervisor. The employee did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, discipline, direct, or adjust grievances or recommend such action. The employee's higher wage and ability to make recommendations concerning wage increases did not amount to Section 2 (11) supervisory status.
Ryder Truck Rental, Inc., 326 NLRB No. 149 (1998)	The Board found that a technician in charge was not a Section 2 (11) supervisor. The Board held the technician did not independently discipline others, did not independently assign work to others, and did not independently assign overtime.
Youville Health Care Ctr., Inc., 326 NLRB No. 52 (1998)	The Board held that charge nurses were not supervisors under Section 2 (11). The Board held that the record demonstrated that the nurses' authority was routine and did not require the use of independent judgment.
Byers Engineering Corp., 324 NLRB No. 125 (1997)	The Board found that a leadman was not a supervisor under Section 2 (11). The Board held that while the leadman did have some authority to make and adjust assignments and direct the work of others, the record did not establish that he used independent judgment.

Case	Section 2(11) Aspect of Case
St. Francis Medical Ctr. – West, 323 NLRB No. 185 (1997)	The Board found that a production leader was not a Section 2 (11) supervisor. The Board held that while the production leader substituted for a manager about 5 of the 10 months proceeding the election, the substitution was not regular, was only temporary and was not likely to recur. Further, even after returning to his regular duties, the production leader's direction of employees was simply routine and did not require use of independent judgment.
Azusa Ranch Market, 321 NLRB No. 112 (1996)	The Board held that a "liquor manager" and "key carriers" were not Section 2 (11) supervisors. The Board held that the limited authority of the employees to assign routine duties to other employees was insufficient to warrant a finding of supervisory status
Rest Haven Living Ctr., Inc., 322 NLRB No. 33 (1996)	The Board held that LPNs were not Section 2 (11) supervisors. The Board held that the nurses did not exercise supervisory authority with respect to directing the work of CNAs, assigning, transferring or disciplining CNAs.
Ten Broeck Commons, 320 NLRB No. 65 (1996)	The Board found that the employers licensed nurse practitioners were not Section 2 (11) supervisors. The Board found that the nurses did not exercise independent judgment in making assignments or directing work, did not effectively render discipline, and they did not sufficiently participate in the evaluation process to render them Section 2 (11) supervisors.
Chevron Shipping Co., 317 NLRB No. 53 (1995)	The Board held that second and third mates and the assistant engineers on steam tankers were not 2 (11) supervisors. The Board found that they did not exercise statutory supervisory authority with respect to discipline, or assignment of overtime.

Case	Section 2(11) Aspect of Case
Harbor City Volunteer Ambulance Squad, 318 NLRB No. 93 (1995)	The Board found that assistant shift supervisors and assistant NEMT supervisors were statutory supervisors under Section 2 (11) because of their role in evaluating other employees. The NLRB found the evaluations to be effective and that they were never changed by upper management.

Chairman ANDREWS. Mr. Tambussi, welcome to the committee.

STATEMENT OF BILL TAMBUSSI, ESQUIRE, COOPER UNIVERSITY HOSPITAL

Mr. TAMBUSSI. Thank you, Chairman Andrews and members of the committee, thank you for allowing me to appear and testify on

behalf of the RESPECT Act. Mr. Chairman, I would like to thank you for the kind words of introduction. We have known each for such a long time.

I will focus my remarks today on the implications of the bill for labor management decisions in the acute care hospital setting, specifically in terms of the trilogy of the recent cases or decisions of the NLRB. I will also use Cooper University Hospital as an example with which I have a great deal of familiarity, having been the hospital's legal counsel during labor negotiations with its unionized nurses who are represented by the Health Professionals and Allied Employees Union.

In the Cooper model what distinguishes the supervisory role, particularly of those employees involved in nursing care, are three essential attributes: The individual is involved in setting compensation; the individual is involved in decisions regarding hiring and termination and also discipline; and the individual is involved in scheduling decisions regarding assignment of staff on a weekly and monthly basis as opposed to simply a shift basis.

These criteria clarify the boundary between those employees of the professional nursing staff that are part of the bargaining unit and those employees who are genuinely supervisory employees and active in a managerial capacity.

At Cooper University Hospital, charge nurses do not fit that practical criteria and are not considered supervisors or management employees. Rather, charge nurses are part of the existing registered nurses professional bargaining unit and recognized as such by Cooper University Hospital.

That said, charge nurses at Cooper Hospital do use independent judgment to assign and responsibly direct other nurses and technicians and licensed practical nurses with respect to patient care. That is, they have the kind of authority that the Board has found to be supervisory.

These charge nurses must exercise these duties to provide effective patient care. It is a function of their professional licensure. In addition, the charge nurses at Cooper are responsible for staff assignments within the narrow confines of a given shift, not longer-term assignments between shifts and units.

It is important to point out that all Cooper nurses, not just charge nurses, use their independent judgment in the course of their professional practice as nurses. For example, all nurses, to some degree, assign and responsibly direct other employees such as technicians and licensed practical nurses and other hospital employees.

Nevertheless, the performance of these duties by charge nurses does not in the Cooper model make charge nurses supervisors.

This system works because Cooper values having a collective bargaining relationship with these professional workers as part of a single bargaining unit. Moreover, in this model, Cooper retains management prerogatives and authorities in the workplace and exercises such prerogatives and authority through its designated supervisors.

If the RESPECT Act is enacted, it would not change or affect the Cooper model because Cooper does not consider or define charge nurses who assign and responsibly direct other nurses, technicians,

licensed practical nurses and other staff personnel with respect to patient care as supervisors.

Further, the RESPECT Act would not interfere with managerial prerogatives exercised through designated supervisors.

From my own vantage point in terms of having practiced labor law in bargaining table negotiations and in courtroom litigation, I believe that the RESPECT Act provides clarity to the current situation in light of the recent conflicting decisions by the NLRB. The act eliminates the highly ambiguous terms "assign" and "responsibly to direct" from the definition of supervisor, terms open to confusion and misinterpretation and inconsistent application.

The clarity achieved by the RESPECT Act reflects both the original intent of the NLRA's framers and everyone's commonsense and practical notions of who is a supervisor in the workplace. So long as these employees are not engaging in or have the authority to engage in other supervisory duties as defined by section 211 more than 50 percent of the time, if all they are doing is assigning and responsibly directing, that is not reason enough to treat them as supervisors.

An employer like Cooper University Hospital recognized this, and is able to maintain effective labor relationships in that framework.

To sum up, the decision of the Board in Oakwood Healthcare and a comprehensive dissent to that decision does little to resolve the issue from a practical standpoint for those of us in the field, at the bargaining table, or at counsel table. The Board's observation that debating linguistic niceties does little to realistically assist in formulating working definitions that fit both the language of section 211 and the overall intent of that provision has become a self-fulfilling prophesy, begetting yet more debate of linguistic niceties. Accordingly, it is in everyone's best interest to temper the debate and focus on the practicalities of what can work in the workplace, as Cooper University has done. Thank you, Mr. Chairman.

[The statement of Mr. Tambussi follows:]

Prepared Statement of William M. Tambussi, Partner, Brown and Connery, LLP, Labor Counsel, Cooper University Hospital

Good afternoon, Chairman Andrews, and members of the committee. I am pleased to offer testimony on the RESPECT Act. I will focus my remarks on the implications of the bill for labor management relations in the acute care hospital setting, and specifically in terms of the trilogy of recent decisions by the National Labor Relations Board.

I also will use Cooper University Hospital as an example with which I have some familiarity, having been the Hospital's legal counsel during labor negotiations with its unionized nurses, who are represented by the Health Professionals and Allied Employees Union.

What distinguishes the supervisory role, particularly of those employees involved in nursing care at Cooper are three essential attributes:

1. the individual is involved in setting compensation;
2. the individual is involved in decisions regarding hiring and termination; and
3. the individual is involved in scheduling decisions regarding assignment of staff on a weekly and monthly basis.

These criteria clarify the boundary between those members of the professional nursing staff that are part of the bargaining unit, and those employees who are genuinely supervisory and act in a managerial capacity. At Cooper University Hospital, charge nurses do not fit that practical criteria and are not considered supervisors or management employees. Rather, charge nurses are part of the existing registered nurses professional bargaining unit.

That said, charge nurses at Cooper University Hospital do use independent judgment to assign and responsibly direct other nurses and technicians and licensed

practical nurses with respect to patient care (i.e., they have the kind of authority that the Board has found to be supervisory). Charge nurses must exercise these duties to provide effective patient care. In addition, charge nurses at Cooper are responsible for staff assignment within the narrow confines of a given shift, not longer term assignment between shifts and units.

It is also important to point out that ALL Cooper's nurses, not just charge nurses, use their independent judgment in the course of their professional practice as nurses. For example, all nurses to some degree assign and responsibly direct other employees such as technicians and licensed practical nurses.

Nevertheless, the performance of these duties by charge nurses does not in the Cooper model make charge nurses supervisors. This system works because Cooper values having a collective bargaining relationship with these professional workers being part of a single bargaining unit. Moreover, in this model, Cooper retains management prerogatives and authority in the workplace and exercises such prerogatives and authority through its designated supervisors.

If the RESPECT Act is enacted, it would not change or affect the Cooper model because Cooper does not consider or define the charge nurses who assign and responsibly direct other nurses, technicians and licensed practical nurses with respect to patient care as supervisors. Furthermore, the RESPECT Act would not interfere with managerial prerogatives exercised through designated supervisors.

From my own vantage point, in terms of having practiced labor law in bargaining table negotiations and courtroom litigation, I believe that the RESPECT Act provides clarity to the current situation, in light of recent conflicting decisions by the NLRB. The Act eliminates the highly ambiguous terms "assign" and "responsibly to direct" from the definition of supervisor—terms open to confusion/misinterpretation and inconsistent application—and the clarity achieved by the RESPECT Act reflects both the original intent of the NLRA's framers and everyone's common sense and practical notions of who a supervisor is in the workplace. So long as these employees are not engaging in or have the authority to engage in other supervisory duties as defined in Section 2(11) more than 50% of the time, if all they are doing is assigning or responsibly directing, that is not reason enough to treat them as supervisors. An employer like Cooper University Hospital recognizes this and is able to maintain effective labor relations within that framework.

The decision of the Board in Oakwood Healthcare and the comprehensive dissent to that decision does little to resolve the issue from a practical standpoint for those of us in the field, at the bargaining table or at counsel table. The Board's observation that "debating linguistic niceties does little to realistically assist in formulating workable definitions that fit both the language of Section 2(11) and the overall intent of the provision" has become a self fulfilling prophesy begetting yet more debate of linguistic niceties. Accordingly, it is in everyone's best interest to temper the debate and focus on the practicalities of what can work in the workplace as Cooper University Hospital has done.

Mr. Chairman, I appreciate the opportunity to testify here today and I would be happy to answer any questions you may have.

Chairman ANDREWS. I would like to thank each of the four of you for very illuminating testimony. We will begin with questions.

Ms. Gay, I was struck by the difference between your description of what you do at your job at which you have been labeled a supervisor and what Mr. Tambussi just described as the way the institution he represents characterizes a supervisor. I go back to the three points that Mr. Tambussi talks about characterizing a supervisor at the institution he represents. Are you involved in your job in setting the compensation for any individual?

Ms. GAY. No, not at all.

Chairman ANDREWS. Are you ever asked for input on that question?

Ms. GAY. No.

Chairman ANDREWS. Are you involved in decisions about hiring individuals, get to determine who gets hired?

Ms. GAY. Never.

Chairman ANDREWS. Are you involved in decisions as to who gets terminated or disciplined or suspended?

Ms. GAY. Never.

Chairman ANDREWS. Is your input ever asked for in those cases?

Ms. GAY. No.

Chairman ANDREWS. Are you involved in schedule decisions regarding assignment of staff on a weekly or monthly basis?

Ms. GAY. No. There is someone assigned for that.

Chairman ANDREWS. And about what percentage of your time—I think you said 5 minutes a day, is that right—what percentage of a typical work shift for you is devoted to the duties that rendered you a supervisor?

Ms. GAY. I said about 10 minutes. Maybe some days it would take 15 minutes if the whole unit is full. But it is about 10 minutes, averages 10 minutes.

Chairman ANDREWS. Unless this decision from the regional Board is overturned, you won't be collectively bargained and represented, will you?

Ms. GAY. No.

Chairman ANDREWS. If there is a grievance process in the contract that is finally agreed to, you won't be entitled to use it, will you?

Ms. GAY. No I won't.

Chairman ANDREWS. Mr. King, I wanted to come back to your testimony. You make the point that fewer than 7 percent of the individuals that were considered for what their status is were regarded as supervisors in the trilogy cases.

Let me ask you this question: In the Oakwood case if the employer had done the following thing with the rotating charge nurses, if the employer had said this group over here will be charge nurses every Monday, this group will be charge nurses every Tuesday, this group will be charge nurses every Wednesday, and so on and so forth, and gave a regular day of the week in which case each one of those charge nurses would be a charge nurse, would they then be supervisors under the trilogy, in your opinion?

Mr. KING. Mr. Chairman, we would have to have a few more facts. I understand where you are going.

Chairman ANDREWS. What else would you like to know?

Mr. KING. I would like to know what authority they had to assign.

Chairman ANDREWS. Exactly the authority in the case before the Board.

Mr. KING. Exactly what Oakwood had? Rotation under Board law, 15-20 percent would be enough if they have the other requisite criteria established.

Chairman ANDREWS. So if they worked 5 days a week, that would be 20 percent. So are they supervisors?

Mr. KING. They may be.

Chairman ANDREWS. I think they would be. If you look at page 14 of the Oakwood decision, the majority opinion in saying that these individuals were not supervisors says the record reveals that none of the units involved here have an established pattern or predictable schedule for when and how often RNs take turns.

So it strikes me that the roadmap here for an employer that wants to define everybody out of the bargaining unit, given the facts of Oakwood, is simply to say Monday, Tuesday, Wednesday.

Ms. Fox, do you agree with that evaluation?

Ms. FOX. Yes. I think one of the most troubling aspects of the decision is how manipulable it is, so that just by assigning these relatively minor duties to employees, that you can deprive them of their protection.

Chairman ANDREWS. If the RESPECT Act—when the RESPECT Act becomes law, would the fact pattern I just described to you render individuals to be supervisors or not?

Ms. FOX. No, because of the removal of the 2 factors from the 12-factor list, the removal of assignment and responsible direction, which are really the only basis on which——

Chairman ANDREWS. How would the majority of the time provision of the bill before the committee affect the fact pattern that I just described to you? Ms. Fox.

Ms. FOX. It is a little more complicated there because the way that the bill is drafted, as I understand it, that it is not the amount of time you spend actually exercising these duties but the amount of time that you spend possessing them. Since she wouldn't be possessing any of the duties——

Chairman ANDREWS. Do you think that would help to clarify some of the ambiguities that exist in the statute?

Ms. FOX. Absolutely. It certainly would. In response to Mr. King, he seems to be suggesting that because an employer wants to assign someone for some even minor point of their time, that should override their interest as employees, which I think is very hard to justify. Obviously if they are spending more than the predominant amount of their time doing supervisory duties, that is one thing; but why should an employee who is most of the time being a rank-and-file employee not have rights under the act?

Chairman ANDREWS. I appreciate the questions and answers and would go to my friend, Mr. Kline, for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman. I apologize to the witnesses. I know you must think we are crazy up here; we get up and walk out and walk back in. As important as this is, there are other things going on. So I apologize.

Ms. Gay, I know that you misspoke there for a second when you said that all you did was put patients in bed. I know that my wife would be appalled to think that is all you did or all she did. If I ever suggested that to her, well, this whole bed thing, it would not be good.

Mr. King, let me get clear on a couple of things here, and I apologize if I missed this discussion. We actually have a monitor in the other room and I was trying to do

multitasking, and that is always a little bit risky. Let me ask if you would view H.R. 1644, Mr. Andrews' bill, as simply overturning the Kentucky River trilogy of cases. And if not, can you tell us in what respects this legislation goes further than that?

Mr. KING. Congressman Kline, there is no limitation in the bill, as introduced, to restrict it just to health care. And as we read the bill it would have substantial impact on all private-sector employers in the country. There is no limitation whatsoever. It is technically I might add, Congressman Kline, incorrectly drafted. There is no such phrase as "responsibility to direct." I am sure that was just a drafting error.

Mr. KLINE. Thank you very much.

Mr. King, I am going to stay with you here for another minute. Ms. Gay testified that, quote, "Every nurse on the floor is someone who at some time or another serves as a charge nurse and therefore, under the Board's Oakwood decision, every one of them is a supervisor." is that correct, is that what the Board held in Oakwood?

Mr. KING. Absolutely not. In fact, as I mentioned, less than 7 percent of the employees in the Kentucky trilogy of cases were found to be supervisors and only 12, as I recall, at Oakwood. Now, what we are really missing here in this discussion is what the person does when she or he is in charge. I am sure Ms. Gay is a very experienced, excellent nurse, but I spend a lot of time with health care employers. An ICU nurse in charge makes life-or-death decisions regarding patients every minute. If that is not supervisory, I don't know what is. And those nurses that are in supervisory situations assign a particular nurse to a particular patient based on the skill, ability, and experience.

Mr. KLINE. I am sorry. We had some discussion going back there. Maybe you could back up and kind of retrace that, if you would be kind enough.

Mr. KING. Certainly. Congressman Kline, an ICU nurse that is in charge of a unit will look to see the acuity level, the seriousness of the patients in that unit, and ICU is traditionally one of the most difficult to staff, very highly ill patients. So the nurse in charge of this type of unit, as you know from your wife's experience, will make decisions on which nurse can be assigned to which patient based on his or her skill, ability, and experience and must often make last-minute decisions or minute-by-minute decisions as to the well-being of that patient. Those are essential assignment issues and are supervisory duties, and I am sure there is not more than one charge nurse on any given unit at any one given time. At least that is my experience. In talking to counsel for Salt Lake Medical Center, that is what he informed me also.

Mr. KLINE. Thank you, Mr. Chairman. Mr. Chairman, I yield back.

Chairman ANDREWS. Thank you. The gentlelady from New York, who is a nurse. I think—is it two nurses in the House?

Mrs. MCCARTHY. Actually, three of us now. We are looking for more though.

Chairman ANDREWS. I know Ms. Pryce is also a nurse. Oh, Ms. Capps. I yield 5 minutes to the gentlelady from New York, Ms. McCarthy.

Mrs. MCCARTHY. Thank you, Mr. Chairman. I appreciate that. I spent 33 years as a nurse before I ever came into this job. And I worked in the intensive care unit, and I will say to you that you really don't know anything about nursing or what is going on in a hospital on a day-to-day basis.

Every single person that works in the hospital, from the charge nurse who basically is watching over all of us but she also does bedside nursing when the floors are short, which is most of the time, each and every one of us have to make at that moment a life-and-death decision making. We don't have somebody looking over our shoulder asking us to make that decision.

So what we have here is a complete misunderstanding of what nurses do. And I am really sorry, Ms. Gay, because I have to say to you back in the 1960s when, quote, "I was the charge nurse on the night shift," I was paid $1 extra a week. I see some things have not changed.

With that being said also, it was mentioned about the National Labor Board. I will have to say for all my years that I have been sitting on this committee, which is 11 years now, the National Labor Board, in my opinion, has certainly not been standing up for the worker or the workplace safety, in my opinion, when I read in the paper constantly how many people are dying on a daily basis because the National Board has not done their work nor has OSHA. Those are the things that are here that we hopefully will be able to address this coming year.

Also let's even leave the nursing world. Let's just go on a day-to-day basis on anyone that works anywhere. I used to work in the A&P back then, mainly because nurses didn't get paid much. So with that being said, I actually made more money in the A&P, part time, than I did as a full-time nurse working in the intensive care unit.

I was assigned, the first woman ever, to work on the night shift supervising, quote, "how to stack shelves." now I had certainly an older manager there, but under your definition I would have been a supervisor, and yet I was only 21 years old.

So you say 7 percent, as far as you have said, that is what people would be considered supervisors. What I don't understand is why are you going so far to have the language changed when it doesn't even cover the majority of people that work. So I don't understand that. Unless the whole intent is just to not have people have the right to organize and belong to a union so that they can have their rights.

Some of us up here have life experiences before we come to Washington. One thing I found Washington doesn't have, common sense doesn't belong in this place. One thing they did do, going way, way back, was have nurses be considered professionals. All nurses are professionals, and they are professionals. So why we are trying to change this at this particular time, I have no idea.

This committee especially is doing everything in its power to, number one, get more people to go into the health care field, especially nurses, and we finally get there and we don't have enough to become professors so they can actually teach nurses, so they can teach more nurses. It all comes down to what are we going to do about the health care.

Everyone on this staff knows that I very rarely give long speeches. I usually just jump right into a question. But I have to tell you since this was passed, number one, it has been an insult to everyone in the health care field. It certainly has been an insult to those hardworking people out there. Yes, we all take on supervisory positions. We don't get paid for it. We do it because it is the right thing. And for the Chamber of Commerce to take a stand on this, I think you are totally wrong. And I hope that we can pass the bill, Mr. Chairman, and bring some common sense back to the health care, certainly for nurses that do a wonderful job on a daily basis, and still don't get paid enough and do save lives on a daily basis.

With that I yield back the balance of my time.

Chairman ANDREWS. Thank the gentlelady.

The gentleman from New Jersey, Mr. Holt, is recognized for 5 minutes.

Mr. HOLT. Thank you, Mr. Chairman. I want to join my colleague from New York in recognizing the work that the nurses do. And just because on maybe Tuesday or Wednesday or Thursday they have a day as a charge nurse doesn't somehow mean that they have different skill or different experience on those other days on the job.

Ms. Gay, let me follow up on something that you had said; that until things change, you say that a nurse would never have a clear and direct path to having her or his voice heard. So you are saying that if you are classified as a supervisor, you don't really get the benefit of being a supervisor, you don't get your voice heard in any of those circles, and you don't get your voice heard through the union circles or other organized circles. Is that your point?

Ms. GAY. Yes, that is my point. Do you want me to elaborate on that?

Mr. HOLT. Let me get at something more along those lines. I would like to get at the positive harm that might be done. I mean are there things—by being classified as a supervisor, are you being forced to do things or prevented from doing things that you would not choose to do otherwise and that you would not have to do if you hadn't been so classified? For example, to take part, as Ms. Fox, said in non-union activities.

Ms. GAY. Right. Like I said, if we are classified as supervisors, therefore we can't be part of the bargaining unit. Our hospital where I work, I believe, is using that as an advantage to themselves so we cannot organize. Like I said in my testimony, that almost every nurse at some point does charge duty, and even though it might take 10 or 15 minutes—and truly, back to Mr. Kline, I realize that of course I do a lot more than just put patients in beds, but that is the point I am trying to make. I truly just—if they say to me you have 6 nurses today and I have 21 patients, you do the math. I mean you have to divide up the patients with the nurses that you have.

And, of course, we all know that a new nurse who has only been there for a month, you are not going to give them a brand-new open heart. I mean that is common sense. I don't think that takes a lot of independent judgment to figure that out. I mean, I think everybody would appreciate if your family member was having open heart surgery that we didn't throw in the nurse that hasn't finish orientation on that basis. So it is a lot of common sense and very simple to assign nurses to patients.

I just feel that if we were classified supervisors, we won't be able to be part of a bargaining unit. Our hospital does not listen to us. I am sorry, they do not listen to us. And that is why we are trying to have a voice in how we take care of patients. And that was our resort, we felt like we had to have a bargaining unit so we could sit down at the table with management and make decisions and have protected activity.

Mr. HOLT. Thank you. Something that has troubled me a great deal is this sense that the anti-organizing, the anti-union attitude

is that it is a zero sum game; that somehow if workers organize, the employer loses. I was struck, Mr. Tambussi, about what has happened at Cooper. Was it a fight between the employees and the management that came to the realization that the nurses didn't need to be classified in this way?

Mr. TAMBUSSI. Congressman Holt, we dealt with this in a practical way. And Congressman Andrews, now Chairman Andrews, will know this; I tend to be more practical in my approach of dealing with things. We had a contract to settle. We were going to settle this contract. We were going to focus on the issues that were practical to Cooper. We knew that these nurses did not equate to be supervisors in our model. We were not going to push that issue to the point where we held up negotiations and delayed getting a contract done. We got our contract done. We were the first hospital in New Jersey to have a contract to reach an agreement, the Friday before Memorial Day last year.

We were proud to do that, we were proud to recognize our nurses for what they were and the positions that they held, with the authority that they held.

Mr. HOLT. Do you think the hospital was the loser——

Chairman ANDREWS. The gentleman's time has expired. If you would briefly answer.

Mr. TAMBUSSI. The institution was better for it and it is a proud institution and very proud of its nurses.

Mr. HOLT. Thank you, Mr. Chairman.

Chairman ANDREWS. The gentlelady from California, Ms. Sanchez, is recognized for 5 minutes.

Ms. SANCHEZ. Thank you, Mr. Chairman. I would like to begin my questioning with Ms. Gay, and I want to say before I start that I really salute your service as a nurse. I know it is a tough job and I appreciate that you and so many others do that job day in and day out.

I want to jump back—in your testimony you said that there was no application process to be a supervisor; that once you had worked a year, you would then be expected to be a charge nurse at times; is that correct?

Ms. GAY. Yes, that is correct.

Ms. SANCHEZ. In your role—and you are not choosing to be a supervisor—let's say they come to you and say we want you to direct the nurses to figure out who is going to cover which patients. Can you at that point stop and say, I don't want to make that decision because I want to remain a nonsupervisory employee. Do you have that luxury or that right?

Ms. GAY. We were told that we didn't have to be a charge nurse if we didn't want to be a charge nurse. So I did that very thing; I went to Human Resources and said I don't want to be a charge nurse, and they told me well, you have to be a charge nurse. I said I never applied for the job, I don't have a job description.

Ms. SANCHEZ. You don't get compensated accordingly.

Ms. GAY. They said oh, we are trying to work on that. They just said you will continue in your charge nurse duties. I found it threatening, that you will continue in your charge nurse duties.

Ms. SANCHEZ. No real option there. I am going to ask two questions that my law professor used to ask whenever we read a case.

Do you think that that is the right decision that you are classified as supervisors, and do you think that that is fair?

Ms. GAY. I think it is terrible classification that I am a supervisor and it is not fair.

Ms. SANCHEZ. In your testimony you explain that you are constantly asked to do more with less and that two-thirds of the nursing staff are classified as charge nurses. Do you believe that there is some chance that without the RESPECT Act, employers like yours might continue to cut back on their nursing staff so that all of them eventually perform enough direction and assignment duties that they will all be classified as supervisory employees?

Ms. GAY. Well, I can only speak for my hospital but I feel that our hospital is just classifying us, like I said before, as a supervisor for their advantage. I don't think that they will cut back on their supervisory duties. They want control. They don't want two-thirds of the nurses making decisions in the hospital. It is a select few that make those decisions and who are the real supervisors.

Ms. SANCHEZ. Thank you.

Ms. Fox, I really appreciate your time and your testimony today. My question actually arises from Mr. King's testimony. He noted that supervisors are in large part responsible for an employer's compliance with things like OSHA rules and regulations, Federal and State protections against sexual and other types of harassment, anti-discrimination statutes, minimum wage and overtime requirements and, quote, "a whole host of the Federal and State labor and employment statutes."

It seems to me that a charge nurse who performs minimal supervisory duties, such as directing another nurse to care for a particular patient as little as 10 to 15 percent of the time, is probably not responsible for the employer's compliance with the extensive laws and regulations that Mr. King described for us, yet such charge nurses can be classified as supervisory employees under existing law.

Do you agree with Mr. King that the enactment of the RESPECT Act would somehow impede employers from successfully assembling their supervisor and management teams and complying with Federal and State regulations and laws?

Ms. FOX. No, I don't. I am not sure I understand the significance of these other law requirements, because the National Labor Relations Act itself never considered anyone to be a supervisor except to the extent they supervise other employees. The fact that they may have other nonsupervisory responsibilities under other Acts, even if those are significant responsibilities, really have nothing to do with whether for purposes of the National Labor Relations Act, they are excluded from coverage.

Ms. SANCHEZ. So the fact that they may somewhat contribute to compliance with these other laws in your professional opinion is not a determining factor in whether or not they, in fact, currently are, or in the future, should be classified as supervisory employees; is that correct?

Ms. FOX. Right. I don't really see why somebody has to be classified as a supervisor for purposes of the National Labor Relations Act in order to assist the employer in complying with minimum wage laws or OSHA requirements.

Ms. SANCHEZ. Thank you, Ms. Fox. I yield back the balance of my time.

Mr. ANDREWS. I thank the gentlelady. The Chair recognizes the gentleman from Pennsylvania, Mr. Sestak, for 5 minutes.

Mr. SESTAK. Thank you, sir. I'm sorry I was not here for the entire proceedings. And from what I gather most of the questions that I would have asked were already brought up. But if I could maybe just make a comment.

I had the opportunity, unfortunately, to have to live in a hospital having spent 31 years in the military and having a young daughter with a brain tumor, 4 years old, after the first of three brain operations we moved down into the hospital down the road, Children's, and lived in an oncology ward for a few months.

And the first group I went after for support after I decided to get into this campaign—into a campaign about a year ago, because I was so taken by the health professions, was the nurses. Although I am not adding much to just to the discussion here, if there is one organization that truly understands supervision, it is the military. And I can tell you that this change in defining what supervision is and isn't and the preponderance of weight placed upon it, is one—this provision has to be changed. It needs to be changed because, you know, I watched the nurses and they were the best of friends. They came to my swearing-in. I mentioned them in my opening comments. And to watch them come in and not just work 12-hour shifts but an hour before and an hour after to make sure everything was done and nothing was dropped between the seams, and one night out of "X" they happened to be the charge nurse.

I understand the good work they did. But then the next day they were right back. And even when they were the charge nurse they were basically doing what they needed to do anyway and often filling in.

My own regret is I did not submit this bill. And I am sorry, Mr. Chairman, I will turn it over to you. But I did not add much to this discussion, but I can't speak highly enough about your profession or work hard enough for your rights for something that is so ill-defined from my background in the military of what a supervisor is. Thank you.

Mr. ANDREWS. I thank the gentleman.

Your little girl is doing very well right now I understand.

Mr. SESTAK. She is and I intend, if we get out early enough, to put her to bed tonight.

Mr. ANDREWS. We will make sure. The gentlewoman from New York City, Ms. Clarke, is recognized for 5 minutes.

Ms. CLARKE. Thank you very much, Mr. Chairman. The Kentucky River cases expands the definition of supervisor. That is what we have been talking about here. I want to focus in on New York City from whence I have come to the Congress.

In New York alone, 57,201 registered nurses; 24,697 secretaries; and office general clerks numbering 13,479 have been adversely affected by the misclassification of the skills and professional employees as supervisors. This is very clearly a management sham. It is a management sham. At a time when health care is in crisis, this type of manipulation is really I think abhorrent, Mr. Chairman.

Let me say this: Mr. King, in response to Ranking Member Kline's question about the definition of the RESPECT Act, you felt that it was too broad in scope and that it could possibly adversely impact corporate entities outside of the health care arena. Let me tell you that this Kentucky River case is a slippery slope. And so said, so done.

The breadth and depth of this precedent is being felt already across multiple industries. In my estimation, this has left potentially hundreds of thousands of employees vulnerable to the interpretations of corporate management regarding their rights and privileges gained through collective bargaining.

In fact, I have personal knowledge of how misclassification of employees adversely impacts the rights and privileges of workers. For example, the Writers Guild of America East has been without a contract since 2005. One of the sticking points in their negotiation is the reclassification of employees. The Kentucky River decision has been quoted, and it supports management's argument for the reclassification of producers as supervisors, thereby stripping the producers of union protection.

This is important because producers are on the front lines and they are more likely to exercise independent news judgment and, in so doing, promoting journalistic integrity. That is something that we are all searching for in this day and age. Therefore, the right to organize and collectively bargain is vital to protecting employees from unfair labor practices.

We have started something here that can certainly spiral without of control. And while we are concerned that we address this issue in the health care arena, I am concerned that there are those who would look to this and exploit it in determining who, in fact, are supervisory personnel and who are not.

Let me just ask for the panel, the Kentucky River cases create the potential for substantial manipulation. I think that has certainly been demonstrated in your testimonies here today. In your opinion, could this possibly shift the balance at the negotiating table towards management thereby creating an uneven playing field? Your responses, please?

Ms. FOX. I think an important point just to reinforce that Mr. King said this is not an issue that is limited to health care. It does impact workers in every industry where workers, because of their skill and experience, often give direction to less skilled employees; to professionals who routinely have assistants or others underneath them to whom they give assistance. As you say, not just in health care, but in many, many industries, there is the opportunity for employers to manipulate assignments to those workers so as to deprive them of rights under the Act.

Ms. GAY. I also agree that the employer can manipulate the assignments to make someone look like they are a supervisor and therefore would not be protected under the Act. So I agree with Ms. Fox.

Mr. KING. I would not agree. The fact are that only four unit clarification petitions to reconfigure bargaining units an Kentucky River have been filed with the National Labor Relations Board. My experience of 30 years including in health care institutions is that employers and unions work this out day in, day out. We don't have

25 percent of the cases, as Ms. Fox indicated, on this issue. We have much less than that.

Unions and employers after Kentucky River have put in their collective bargaining agreement, as Cooper University hospital did, a way to handle this. There is not a case to be made here. What the NLRB did in Kentucky River is follow the United States Supreme Court dictate. This statute was carefully, thoughtfully crafted. There is checks and balances, like, in all legislation that this body looks at every day. This is not being manipulated. What is being manipulated here are arguments that don't stand the light of day. The facts don't support the legislation.

Mr. TAMBUSSI. What we need to do, Congressperson, is we need to make the Act clearer, less ambiguous, to remove the debate about legal niceties so that we can get down to the practical aspect of settling contracts. I believe the RESPECT Act helps in that regard.

Mr. ANDREWS. Thank you very much to the gentlewoman. The bell means that we have a vote in a little less than 15 minutes. What I propose to do is go to Mr. Kildee's questions and then Mr. Kline, and I can wrap up and thank the witnesses.

The gentleman is recognized for 5 minutes.

Mr. KILDEE. Thank you, Mr. Chairman. I associate myself with the very good remarks of the gentlewoman from New York, Mrs. McCarthy and for that reason I am cosponsor of H.R. 1644 and very proud to be so. Thank you very much, Mr. Chairman.

Mr. ANDREWS. I thank the gentleman. The gentleman from Minnesota have any follow-up questions?

Mr. KLINE. No, thank you very much, Mr. Chairman. I would like to thank the witnesses again, I haven't seen this many nurses in one room since our last house party. Nice to see you here.

I would like to ask unanimous consent, Mr. Chairman, to include this letter from the American Hospital Association.

[Two letters from the American Hospital Association follow:]

THE AMERICAN ORGANIZATION OF NURSE EXECUTIVES,
AMERICAN HOSPITAL ASSOCIATION,
May 21, 2007.

Hon. JOHN P. KLINE, *Ranking Member,*
Subcommittee on Health, Education, Labor and Pensions, Committee on Education and Labor, Washington, DC.

DEAR REPRESENTATIVE KLINE: The American Hospital Association (AHA), on behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 37,000 individual members, and the American Organization of Nurse Executives (AONE), representing professional nurses in executive practice, would like to take this opportunity to clarify any concerns that National Labor Relations Board (NLRB) decisions have not provided sufficient clarity for hospitals to determine when charge nurses function as supervisors. We believe that existing NLRB guidance provides clear, practical assistance to hospitals for determining whether the role and function of their charge nurses meet the criteria for supervisory status. Legislation to clarify the essential characteristics of supervisory status is unnecessary, and we therefore oppose H.R. 1644, which would amend the National Labor Relations Act (NLRA) to reverse the existing NLRB guidance in this area.

Charge nurses assess the acuity of a patient's illness, as well as which staff have the skill sets to best care for the patient. When serving in that role, the charge nurse acts on behalf of the hospital, providing a management/leadership voice to patients, families and other employees. Existing NLRB guidance correctly recognizes that charge nurses exercise significant independence and discretion in making critical judgments about patient care. The NLRB has clearly established that hospital charge nurses who regularly assign nursing personnel to specific patients and make

the assignments based upon "the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients" meet the test for supervisor.

NLRB guidance defines each of the terms characterizing such supervisory status—"assign," "responsibly directs" and "independent judgment"—and then applies them in the health care context using fact patterns as illustrations.

- To "assign" refers to the act of designating an employee to a place (such as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties (tasks) to an employee.
- "Responsibly to direct" means that the employee overseeing another employee is accountable for the other employee's performance of the task.
- "Independent judgment" involves the exercise of significant discretion in making decisions that are not routine or clerical in nature.

In the health care setting, the NLRB specifically interpreted the term "assign" to encompass the charge nurse's responsibility to assign nurses and aides to particular patients. NLRB guidance distinguishes between a charge nurse's designation of significant overall duties to an employee (e.g., designating a licensed practical nurse (LPN) to regularly administer medication to a patient or group of patients) and an ad hoc instruction that the employee perform a discrete task (e.g., ordering an LPN to immediately give a sedative to a particular patient). Permanent charge nurses in a hospital who assign nursing personnel to the specific patients for whom they would provide care during their shift, and who make the assignments based upon "the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients," meet the test for supervisor. In contrast, permanent charge nurses who assign employees to particular locations within the emergency department, rather than to particular patients, are not supervisors.

Under the NLRB's interpretation of "responsibly to direct," there must be some adverse consequence for the supervising employee if the task performed was not performed properly. This means that the charge nurse must be subject to lower performance evaluations or disciplinary action if the other staff members fail to adequately perform their assigned tasks.

In considering whether charge nurses exercise sufficient discretion to meet the test for "independent judgment," the NLRB responded specifically to the Supreme Court's criticism of its previous interpretation of independent judgment. The NLRB's response focused on the degree of discretion exercised by the charge nurse, recognizing that the unique needs of each patient must be taken into account and that matching a nurse with a patient may have significant consequences for the health of the patient. The NLRB distinguished assignment decisions implementing detailed instructions (e.g., a staffing decision based on a fixed nurse-to-patient ratio, or pursuant to a bargaining agreement requiring that seniority be followed) from company policies that allow for discretionary choice (e.g., a policy that details how a charge nurse should respond in an emergency, but the charge nurse determines when an emergency actually exists or may deviate from that policy based on his or her assessment that a significant change is needed).

The NLRB guidance strikes a reasonable balance for hospitals in setting the criteria for when charge nurses function as supervisors. A charge nurse who rotates into the role on a regular basis, for example, may qualify as a supervisor, but will not meet the NLRB criteria for designation as a supervisor in the absence of an established pattern or predictable schedule. Additionally, charge nurses who delegate the performance of certain tasks to other nursing staff may meet the test for "responsible direction," but only if they have accountability for the way the task is carried out. Criticisms that the NLRB guidance is unclear seemingly are more about dissatisfaction with this reasonable balance that the NLRB guidance has struck than any lack of clarity in the NLRB's criteria for determining when charge nurses function as supervisors.

We urge members of the committee to reject H.R. 1644.

Sincerely,

RICK POLLACK,
Executive Vice President, Chief Executive Officer AHA AONE.

PAMELA A. THOMPSON, MS, RN, FAAN.

THE AMERICAN ORGANIZATION OF NURSE EXECUTIVES,
AMERICAN HOSPITAL ASSOCIATION,
May 4, 2007.

DEAR REPRESENTATIVE: On behalf of the American Hospital Association's (AHA) nearly 5,000 member hospitals, health systems and other health care organizations, and our 37,000 individual members, and our subsidiary, the American Organization

of Nurse Executives (AONE), which represents professional nurses in executive practice, we are writing to express our opposition to H.R. 1644. The legislation would amend the National Labor Relations Act (NLRA) to reverse the National Labor Relations Board (NLRB) guidance used to determine the essential characteristics of supervisory status. For hospitals, the issue affects primarily whether our charge nurses are classified as supervisors. This issue is critical to the safety of our patients and the management of the patient care environment.

Specifically, the legislation removes from the NLRA two necessary functions that classify a charge nurse as a supervisor: "assigning" and "directing" other staff. Charge nurses are often the most visible people "in charge" of a specific hospital unit, and their judgment and discretion are essential. NLRB guidance recognizes that charge nurses exercise independence and discretion in making critical judgments about patient care. A charge nurse assesses the acuity of a patient's illness, as well as which staff have the skill sets to best care for the patient. When serving in that role, the charge nurse acts on behalf of the hospital, providing a management/leadership voice to patients, families and other employees.

Hospitals never know who or how many patients will walk through their doors on any given day. The women and men who work in hospitals stand ready to treat everything from flu outbreaks to highway accidents and scores of other sudden emergencies. It is essential that charge nurses be recognized for the leadership role they play in this challenging and complex environment. We oppose the legislation because it fails to recognize this important and unique role.

The legislation is entirely unnecessary; existing NLRB guidance strikes a reasonable balance in setting the criteria for when charge nurses function as supervisors. The NLRB has found that hospital charge nurses who regularly assign nursing personnel to specific patients and make the assignments based upon "the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients," meet the test for supervisor. H.R. 1644 does not recognize the distinction.

We ask that you join us in opposing this legislation.

Sincerely,

RICK POLLACK,
Executive Vice President, Chief Executive Officer AHA AONE.

PAMELA A. THOMPSON, MS, RN, FAAN.

Mr. ANDREWS. Without objection.

Mr. KLINE. And again, thank you to the witnesses.

Mr. ANDREWS. And I would ask unanimous consent that a statement from Senator Dodd be entered into record.

[The prepared statement of Senator Dodd follows:]

Prepared Statement of Hon. Christopher J. Dodd, a U.S. Senator From the State of Connecticut

Thank you, Chairman Andrews and Ranking Member Kline, for offering me the chance to convey my views today to the Health, Employment, Labor, and Pensions Subcommittee. And I would like to thank the entire Subcommittee for today's hearing on an issue so central to American workers' right to organize.

I want to express my strong support for a piece of legislation that I introduced in the Senate, and which has been championed by Chairman Andrews in the House: the Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers Act, or RESPECT Act

The RESPECT Act would make vital changes to the National Labor Relations Act's definition of supervisor, ensuring that no employee is unjustly denied his or her right to join a labor union. This is a very simple bill—just four lines of text making a few definitional changes. Yet the livelihoods of thousands, possibly millions, of workers are at stake in those few lines. Workers designated as supervisors may not join a union or engage in collective bargaining. As AFL-CIO president John Sweeney has argued, unfair classification "welcomes employers to strip millions of woerkers of their right to have a union." Unfortunately, President Bush's appointees on the National Labor Relations Board (NLRB) have upheld these "classifications in name only."

The NLRB has struggled for years with the definition of supervisor. Twice in the last ten years, its attempts to define supervisory status have been reviewed and rejected by the Supreme Court. But despite this, the NLRB refused to hear oral arguments for the three decisions it handed down last October—Oakwood Healthcare,

Inc., Golden Crest Healthcare Center, and Croft Metals, Inc. These decisions are known collectively as the Kentucky River decisions, after the 2001 Supreme Court case of NLRB v. Kentucky River.

The NLRB ruled that many charge nurses are supervisors, even though they have no authority to hire, fire, or discipline other employees. In the course of their responsibilities to provide the best care possible to their patients, many rank-and-file nurses occasionally rotate through a limited oversight role, such as assigning other nurses to patients based on workload or a nurse's particular specialty. But on a pretext as slim as that, employers would keep their workers from unionizing altogether.

In the Oakwood decision, the hospital argued that 127 of its 181 nurses were supervisors. Though the NLRB found that only 12 were in fact supervisors, its decision left the door open for widespread abuse. Under its ruling, only 10 percent of a worker's time in a supervisory capacity is enough to lock him or her out of a union.

Following that precedent, another hospital declared a ludicrous number of its registered nurses to be supervisors—and an NLRB Regional Director agreed. Seventeen of 20 registered nurses in the Intensive Care Unit were declared supervisors; 6 of 7 in the Medical Unit; 9 of 11 in Neonatal Intensive Care; and in the Inpatient Rehabilitation Unit—all 7. Fictitious classifications like these show just how far some will go to keep workers from bargaining fairly, and just how far the NLRB will go to act as enabler.

Though recent NLRB decisions have targeted nurses, the dangerous precedent they set threatens the rights of workers in countless industries. The NLRB has opened a Pandora's box: Laborers who sometimes work with assistants, or skilled craftsmen who take apprentices, can be barred from unions by the same false logic that prevents nurses from organizing.

The dissenting opinion of the NLRB's two Democrats put it bluntly: The Kentucky River decisions threaten "to create a new class of workers under federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."

Mr. President, these decisions are written on more than paper. They're written on real lives, on workers in the thousands and millions, on the dignity of their labor, the health of their children, and the security of their old age. For them, legal fiction becomes painful fact: Without their fair seat at the table, workers will possibly see lower wages, longer hours, more dangerous working conditions, and threats to their healthcare and retirement.

The services they provide will suffer as well. Take the case of nurses: Many fear retribution if they speak out on their own about unsafe practices that could endanger patients' lives. Instead, many rely on their unions to provide a strong, unified voice for improved patient care. It's in our interest to keep that voice strong—just one example of how healthy unions benefit us all.

The RESPECT Act offers a commonsense step to protect workers' rights. It deletes the terms "assign" and "responsibly to direct" from the definition of supervisor—terms that the NLRB drastically expanded to justify its rulings. The bill also would require that, to be classified as a supervisor, an employee must actually be one by specifying that an employee must spend the majority of his or her worktime in a supervisory capacity.

That's hardly a radical innovation—in fact, it returns us to Congress's original intent. In 1947, the Senate Committee Report on amendments to the National Labor Relations Act stated that:

> the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with * * * genuine management prerogatives.

Clearly, Congress did not intend to deny the right to organize to those workers whose jobs require only occasional and minor supervisory duties. The RESPECT Act restores that sensible precedent.

Mr. President, it's not by chance that the rise of the labor movement coincided with the rise of the largest and strongest middle class the world has ever seen. The achievements of the labor unions have made it possible for many working men and women to send their children to college, to store up savings for sickness, injury, and old age—to move from deprivation to dignity. The labor movement contributed greatly to the strengthening of the American middle class.

Its progress was opposed at every step—sometimes by intimidation, sometimes by violence, sometimes by propaganda. Today it is opposed by specious reasoning and twisted definitions of a kind I've rarely seen in public life. I hope the distinguished

members of this Subcommittee will be moved to support this bill out of their respect for honesty alone. But add the fact that the security and dignity of so many of their constituents depend on the right to organize and bargain, and the case becomes as clear as day. I urge you to support this bill.

Thank you again, Chairman Andrews and Ranking Member Kline, for the opportunity to submit this statement.

Without objection.

I would like to thank the witnesses for very edifying thoughtful testimony. I would like to thank the audience participation for their enthusiasm and interest in the issue. The committee will be debating this issue and regarding the arguments both for and against it. I thank the witnesses for helping us to develop what I think is a comprehensive record on which the Members of the House can make a judgment as to what they ought to do. I certainly hope that they support the legislation.

But I would like to thank all of those who expressed all different points of view today. And the committee stands adjourned.

[The prepared statement of AFSCME, submitted by Mr. Andrews, follows:]

Prepared Statement of the American Federation of State, County and Municipal Employees, AFL–CIO (AFSCME)

On behalf of the 1.4 million members of the American Federation of State, County, and Municipal Employees (AFSCME), I am pleased to submit this statement for the official record of the House Health, Employment, Labor and Pensions Subcommittee of the Education and Labor Committee's Hearing on the RESPECT Act, H.R. 1644.

Whether a worker is classified as a supervisor or an employee under the National Labor Relations Act (NLRA) has enormous consequences for tens of thousands of AFSCME workers as well as millions of other health care, building and construction trades, and manufacturing workers. The collective bargaining rights of millions of professionals who routinely direct the work of other professionals and less-skilled employees is at stake.

The recent decisions by the National Labor Relations Board (NLRB), collectively known as the Oakwood Trilogy, radically broadened the decades-old interpretation of the term "supervisor" under federal labor law. If these decisions are permitted to stand, employers will be able to strip federal labor law protection from millions of workers who are clearly not part of management. As the dissenting opinion in Oakwood argues, the decision "threatens to exclude almost all hospital nurses—as well as countless professionals and others who oversee less-skilled coworkers—from the protection of the Act."

An examination of the legislative debates conducted at the time that the National Labor Relations and the Taft Hartley Acts were approved clearly show that Congress did not intend to deny federal labor law protection to "minor supervisory employees". The NLRA, passed in 1935, did not distinguish between employees and supervisors while the Taft Hartley Act, passed in 1947, and excluded "supervisors" from the protection of the NLRA. Without NLRA protection, "supervisors" can be legally fired for union activity. However, the Taft Hartley Act itself expressly included both "professional employees" and employees in "craft units" within the protection of the NLRA and the legislative record shows that in passing the Taft Hartley Act, Congress intended nurses to be considered "professional employees."

Furthermore, the record shows that Congress was aware that most professionals, and many skilled employees such as craft workers, routinely assign tasks to, and direct the work of, less-skilled or less-experienced workers, but did not intend for this routine assignment and direction to result in their exclusion from NLRA protection.

It is urgent that the Congress pass The RESPECT Act, H.R. 1644 and S. 969, to restore the original intent of the NLRA. The RESPECT Act would eliminate the tension between ambiguous statutory language, which has proven exceedingly difficult to circumscribe, and the clear intent of Congress not to exclude professional and other employees with minor supervisory duties, but who may routinely assign tasks and provide direction to other employees from NLRA protection. The RESPECT Act

would do so by (1) excising the terms "assign" and "responsibly to direct" from the NLRA definition of "supervisor," and (2) providing that "supervisors" must possess supervisory authority for a majority of their work time.

These changes would respect the original intent of Congress and have the additional valuable benefit of avoiding many more years of unnecessary litigation. And most importantly, workers who are not genuine supervisors would continue to have the protections that were awarded to them over 70 years ago by the NLRA.

AFSCME strongly supports The RESPECT Act and urges the Congress to pass this important legislation.

[A July 12, 2006, Economic Policy Institute (EPI) Issue Brief, submitted by Mr. Andrews, follows:]

EPI ISSUE BRIEF

ECONOMIC POLICY INSTITUTE • ISSUE BRIEF #225 JULY 12, 2006

SUPERVISOR IN NAME ONLY

Union rights of eight million workers at stake in Labor Board ruling

BY ROSS EISENBREY AND LAWRENCE MISHEL

The National Labor Relations Board (NLRB) will soon decide three cases, known collectively as the Kentucky River cases, which could change the basic rights of workers in America. If the NLRB accedes to the demands the employers are making in these cases to significantly broaden the definition of "supervisor," hundreds of thousands of employees could be stripped of their contract protections and millions more across the economy could be denied the right to form unions or engage in collective bargaining.

The National Labor Relations Act (NLRA), the nation's primary law determining the rights of employees to join unions and bargain collectively, excludes "supervisors" from the definition of "employee" (29 USC 152 (3)). A "supervisor" is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (29 USC 152 (11))

The three cases are: *Oakwood Healthcare Inc.*, *Golden Crest Healthcare Center*, and *Croft Metals, Inc*. The cases deal respectively with registered nurses (RNs) acting as "charge" nurses in a hospital; "charge" nurses (RNs and LPNs) in a long-term care facility; and "leadmen" and "load supervisors" in a manufacturing facility.

The upcoming cases all involve whether these employees can be classified as supervisors and thus excluded from NLRA protections and participation in collective bargaining because they "responsibly direct other employees" while using "independent judgment." But until now no one would have called these employees "supervisors" in the traditional sense because they do not have authority to hire, fire, discipline, evaluate, or promote the employees they supposedly supervise.

Skilled and experienced workers such as registered nurses, who give instructions to co-workers about how and when to perform certain tasks, are particularly vulnerable to reclassification as supervisors under this push for a broader reinterpretation of the term. For example, nurses who tell orderlies or nurse aides to do certain things for particular patients are at high risk of reclassification, as are journeymen construction workers who guide other workers on a crew.

These forthcoming decisions have the potential to affect a wide range of workers, including many in the building and construction, broadcast, energy, shipping, accounting, and health care industries. The very broad definition of "supervisor" employers are seeking ultimately could take away the right to join a union and bargain collectively from 8 million Americans throughout the labor market.

We have analyzed the potential impact of the decisions in two ways: by examining the supervisory duties associated with the occupations involved in dozens of cases pending before the NLRB or its hearing officers, and by examining the supervisory duties of the entire U.S. private sector workforce that is covered by the NLRA. Looking just at the dozens of pending cases, the position advocated by the employers involved would lead to the exclusion of approximately 1.4 million employees as supervisors. Across all occupations, this extreme employer-centric position would strip 8 million more workers of their right to participate in a union and bargain collectively, adding to the approximately 8.6 million first-line supervisors that the GAO estimates have already been excluded by prior interpretations of the NLRA.[1]

In each of 35 occupations, ranging from registered nurses and computer systems analysts to private guards and police officers, more than 50,000 employees could lose their right to join a union or bargain collectively (**Table 1**).

TABLE 1
Occupations with more than 50,000 workers affected

Census occupation title (NCS code)	Share with supervisory duties at Level 2	Affected workers (in 1,000s)
Registered Nurses (95)	34.8%	843.0
Computer Systems Analysts and Scientists (64)	25.5%	397.0
Management Related Occupations, N.E.C. (37)	26.4%	200.2
Accountants and Auditors (23)	26.2%	180.7
Cooks (436)	11.1%	180.0
Secretaries (313)	7.3%	166.9
Cashiers (276)	4.4%	162.0
Electricians (575)	23.4%	152.0
Other Financial Officers (25)	27.3%	144.7
Social Workers (174)	23.1%	144.0
Sales Workers, Other Commodities (274)	6.0%	133.5
General Office Clerks (379)	6.4%	127.0
Engineers, N.E.C. (59)	25.4%	125.8
Licensed Practical Nurses (207)	18.4%	123.8
Bookkeepers, Accounting, and Auditing Clerks (337)	6.5%	121.7
Machine Operators, N.E.C. (777)	6.5%	99.0
Food Preparation Occupations, N.E.C. (444)	3.9%	95.0
Bank Tellers (383)	12.1%	93.0
Assemblers (785)	4.2%	91.7
Carpenters (567)	15.9%	87.2
Personnel- Training and Labor Relations Specialists (27)	21.3%	85.0
Janitors and Cleaners (453)	3.4%	83.0
Electrical and Electronic Engineers (55)	17.8%	78.9
Mechanics and Repairers, N.E.C. (547)	11.1%	77.5
Pharmacists (96)	34.7%	70.5
Administrative Support Occupations, N.E.C. (389)	6.6%	69.2
Advertising and Related Sales Occupations (256)	30.8%	67.5
Stock Handlers and Baggers (877)	3.4%	66.6
Truck Drivers (804)	2.5%	65.9
Food Counter, Fountain, and Related Occupations (438)	4.9%	62.7
Industrial Machinery Repairers (518)	10.2%	57.4
Health Technologists and Technicians, N.E.C. (208)	8.7%	55.2
Physicians Assistants (106)	62.6%	53.7
Physicians (84)	18.5%	52.4
Construction Trades, N.E.C. (599)	20.5%	51.5
Guards and Police, Except Public Service (426)	4.1%	50.3
Total		**4,715**

In 24 occupations, including physician assistants, tile setters, and registered nurses, more than 30% of those employed could lose their union rights (**Table 2**).

The occupations involved in the cases we reviewed that are pending before the NLRB or its administrative law judges include at least those listed in **Table 3** (**see page 4**), if not more.

Method of Analysis

The estimate of the effect of reclassifying these workers as supervisors and removing them from NLRB coverage was calculated using data on the share of each of 447 detailed occupations affected and the employment level in each occupation.

Specifically, we employ the Bureau of Labor Statistics' estimates of the share of each occupation that has so-called "supervisory" duties. This share is based on the factors provided in the Bureau of Labor Statistics' National Compensation Survey, which assigns a level to each occupation according to its skill content along 10 dimensions, including knowledge, complexity, personal contacts, and so on. One of these 10 "leveling factors" is "Supervisory Duties," describing "the level of supervisory responsibility for a position." We have identified that those having supervisory duties at what NCS calls "Level 2" will be impacted by the potential ruling. The U.S. Department of Labor provides a description of "Level 2" duties on page 177 of Bulletin 2561, *National Compensation Survey: Occupational Wages in the United States, July 2002*:

> Incumbent sets the pace of work for the group and shows other workers in the group how to perform assigned tasks. Commonly performs the same work as the group, in addition to lead duties. Can also be called group leader, team leader, or lead worker.

To estimate the effect of excluding employees who work at supervisory Level 2, we needed to identify the employment levels in each occupation. BLS kindly provided an estimate of the share of private, non-farm employment in each occupation in 2002. Some information on "confidential employment" was excluded, and as a result the occupation shares totaled 99.6% rather than 100%. We rescaled the share to allow them to sum to 100%. We multiplied each occupation's employment share by the total non-farm, private payroll employment in 2005.

Given these data, the impact on each occupation is simply the share affected multiplied by the employment level. The total affected is the sum of the impact of the individual occupations.

TABLE 2
Occupations with more than 30% affected

Census occupation title (NCS code)	Share with supervisory duties at Level 2
Physicians Assistants (106)	62.6%
Nuclear Engineers (49)	49.5%
Tile Setters, Hard and Soft (565)	48.1%
Chemistry Teachers (115)	44.8%
Underwriters (24)	40.0%
Sheetmetal Duct Installers (596)	39.7%
Agricultural and Food Scientists (77)	39.7%
Social Scientists, N.E.C. (169)	38.4%
Power Plant Operators (695)	37.1%
Physical Therapists (103)	36.8%
Electrical Power Installers and Repairers (577)	35.9%
Recreation Workers (175)	35.1%
Business, Commerce, and Marketing Teachers (135)	34.9%
Registered Nurses (95)	34.8%
Pharmacists (96)	34.7%
Aerospace Engineers (44)	34.4%
Therapists N.E.C. (105)	34.0%
Physical Scientists N.E.C. (76)	33.5%
Dressmakers (666)	32.9%
Biological Science Teachers (114)	32.2%
Science Technicians, N.E.C. (225)	31.9%
Advertising and Related Sales Occupations (256)	30.8%
Actuaries (66)	30.7%
Health Diagnosing Practitioners N.E.C. (89)	30.6%

Endnotes

1. General Accounting Office. 2002. *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*, GAO-02-835, September, p.10.

TABLE 3
Occupations directly affected by pending cases

Census occupation title (NCS code)	Supervisory duties at Level 2	Affected workers (in 1,000s)
Physicians (84)	18.5%	52.4
Registered Nurses (95)	34.8%	843.0
Business, Commerce, and Marketing Teachers (135)	34.9%	9.4
Editors and Reporters (195)	12.0%	24.1
Licensed Practical Nurses (207)	18.4%	123.8
Sales Representative Mining, Manufacturing, and Wholesale (259)	5.2%	31.3
Demonstrators-Promoters and Models, Sales (283)	3.2%	4.6
Dispatchers (359)	9.1%	11.9
Weighers, Measurers, Checkers, and Samplers (368)	1.4%	0.4
Baggage Porters and Bellhops (464)	4.1%	2.3
Millwrights (544)	6.9%	5.2
Glaziers (589)	20.8%	10.2
Tool and Die Makers (534)	13.8%	22.0
Stationary Engineers (696)	21.9%	9.4
Sawing Machine Operators (727)	3.6%	4.1
Printing Press Operators (734)	8.4%	25.1
Assemblers (785)	4.2%	91.7
Production Inspectors, Checkers, and Examiners (796)	6.0%	28.9
Theology Teachers (147)	2.2%	0.3
Trade and Industrial Teachers (148)	5.3%	0.3
Freight, Stock, and Material Handlers, N.E.C. (883)	3.8%	43.8
Post-secondary Teachers	11.7%	42.6
Total cases	**14.6%**	**1,387**

[Letter from the National Association of Waterfront Employers (NAWE), submitted by Mr. Kline, follows:]

NAWE

National Association of Waterfront Employers

919 – 18TH STREET, NW • SUITE 901 • WASHINGTON, DC 20006
TEL 202 587-4800 • FAX 202 587-4888 • www.nawe.us

May 18, 2007

Congressman Robert E. Andrews
Chairman, Subcommittee on Health, Employment, Labor and Pensions
House Education and Labor Committee
U.S. House of Representatives
Washington, DC 20515

Re: NAWE Comments on H.R. 1644, The "RESPECT" Act

Dear Chairman Andrews:

These comments are submitted for the record on behalf of the members of the National Association of Waterfront Employers ("NAWE"). NAWE members are the private sector marine terminal operators ("MTOs") and stevedoring companies who operate the majority of the general cargo/container terminals in the U.S. NAWE is opposed to any change to the National Labor Relations Act ("NLRA") that would limit the definition of "supervisor" under the Act by redefining its job functions in a manner that may convert front-line supervisors, and other management personnel to employees eligible to 'form, join, or assist' longshore or other unions.

This legislation is being advanced by advocates as solely addressing the issue of who is a nursing supervisor in hospitals and similar facilities, and overturning several Supreme Court decisions [see *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571 (1994) and *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001)] dealing with supervisors in the health care industry. However, the language of the proposed amendment—by deleting the job functions "assign," "or responsibly to direct them," and adding the qualifier "for the majority of an individual's work time"—is not limited to the health care industry and directly affects the distinction between MTO/stevedore front-line supervisors, generally known as ship superintendents, and members of longshore gangs hired on a multi-employer basis from union hiring halls. The ship superintendent is management's representative on the ship. His/her principal duties ordinarily are to 'assign' or 'direct' the various gangs sent from the hiring hall to work the ship, as discussed in detail below.

Under general maritime law, vessels, prior to being unloaded/loaded, have a 'turnover duty' to the 'stevedore' employer who, in turn, has a reciprocal duty to use its expertise and experienced judgment in conducting cargo operations while loading/unloading the vessel. Ship superintendents are essential to carrying out the expert performance required of a stevedore company and are placed on the vessel to ensure that cargo handling operations are conducted in a safe and efficient manner. This can only be achieved with the undivided loyalty of the ship superintendent to his/her MTO/stevedore employer, and not by splitting the superintendent's loyalties between his/her employer and his/her union. In addition to the fact that the MTO/stevedore is the responsible party for compliance with general maritime law, it is also the responsible party for compliance with

NAWE

numerous U.S. employment and labor laws, such as OSHA, and therefore a supervisory presence aboard a vessel is necessary to accomplish this.

Among other management duties, ship superintendents coordinate the vessel loading/unloading plan, supervise the longshore gang's work schedule (frequently 3, 4, or 5 gangs work a vessel at any given time), supervise gang work assignments/functions/equipment, supervise ongoing cargo operations (including adherence to management's safety directives and compliance with applicable OSHA regulations), ensure 'domain awareness' and other federal security requirements are maintained under Coast Guard facility security regulations, and handle a whole host of possible things that could go wrong (e.g., equipment breakdown, etc.). Furthermore, ship superintendents coordinate inspections or other intrusions by any one of about 40 federal, state, or local law enforcement agencies that have some jurisdiction over marine terminals, cargo, containers, etc.

All of these particular duties are based on the two key NLRA job functions—'assigning' or 'directing'—at issue here. Changing the definition to eliminate these two functions, but requiring the remaining functions to be performed 'for the majority of an individual's work time' will jeopardize the ability of an MTO/stevedoring company to employ a superintendent with undivided loyalty to control cargo operations and supervise the loading and unloading of vessels. Supervisory status will simply become more difficult to demonstrate.

If the "RESPECT" Act legislation were to become law, an entire body of already settled litigation in this industry would come under scrutiny. MTOs and stevedoring companies would undoubtedly be forced to re-litigate every NLRB Regional Director and ALJ decision regarding who is a supervisor, and would be doing so at a serious disadvantage.

NAWE and its members therefore respectfully oppose enactment of any amendment to the NLRA with such broad ramifications and urge the Committee to drop any further consideration of the "RESPECT" Act.

Sincerely,

Charles T. Carroll, Jr.
Executive Director

CTCjr/et

cc. Congressman John Kline
Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions
House Education and Labor Committee
U.S. House of Representatives
Washington, DC 20515

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

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